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Joseph A. Colquitt

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## Evidence and Ethics: Litigating in the Shadows of the Rules

### Cover Page Footnote

Jere L. Beasley Professor of Law, University of Alabama School of Law; Senior Circuit Judge, State of Alabama. I thank the University of Alabama Law School Foundation for its generous support. I appreciate the assistance of Robert Arnwine, Jr., Liz Whipple, Cherie Knotts, and Trey Abbott, who provided research assistance and helpful comments. The statements and opinions in this essay are mine alone, and naturally, I alone remain responsible for any errors. It should be noted that to fit within the space available, this essay relies primarily on the Federal Rules of Evidence, the Model Rules of Professional Responsibility, and cases that illustrate the point under discussion. It also focuses on two criminal case scenarios, and eschews discussing civil litigation, although much of the discussion also is applicable to civil matters.

# EVIDENCE AND ETHICS: LITIGATING IN THE SHADOWS OF THE RULES

*Joseph A. Colquitt\**

What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom.<sup>1</sup>

## INTRODUCTION

Many jurisdictions are blessed with modern, comprehensive rules of evidence drawn from centuries of common law principles. Likewise, most states also have contemporary rules of ethics compiled from a century of such rules.<sup>2</sup> Yet attorneys on both sides of a case often possess and exercise considerable discretion during trials, and neither evidence law nor ethics rules satisfactorily limit that discretion, which might permit an attorney to violate the spirit of these rules.

It almost goes without saying that in the course of a trial, litigating attorneys frequently make tactical decisions, such as whether to present particular evidence or oppose an opponent's proffer of evidence. The rules of evidence may permit the use of the particular evidence, yet the attorney may choose to forego its use. The rules may bar the use of the evidence, yet the opposing attorney might not object to the proffer. Thus, the rules provide guidance, but not necessarily answers.

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1. Resolution XXXIII, in 2 David Hoffman, *A Course of Legal Study* 765 (Baltimore, Joseph Neal, 2d ed. 1836).

2. See, e.g., Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. Rev. 1385, 1448 (2004) ("By 2000, most states had adopted some form of the Model Rules . . ."). The American Bar Association (ABA) first promulgated standards in 1908. *Id.* at 1385. Its Canon of Ethics was drafted from the 1887 Alabama State Bar's Code of Ethics. *Id.*

Similarly, rules of ethics do not always determine how an attorney should conduct the prosecution or defense of a case.<sup>3</sup> The rules may strictly govern an action, or they may only suggest how an attorney should pursue a matter during litigation. Just as with evidence rules, strict adherence to the rules of ethics still may leave an attorney with considerable discretion. This essay examines two scenarios in which such remaining discretion exists to highlight the point that rules of evidence and ethics may not adequately inform attorneys of the proper course of action during litigation.

A considerable number of scholarly writings discuss the ethics of prosecutors and defense attorneys. Many of these articles and books address particularly challenging issues such as whether a prosecutor should pursue a case if she believes the accused is innocent of the charges,<sup>4</sup> or whether an attorney should attempt to discredit a witness who he knows (or, perhaps, only believes) is telling the truth,<sup>5</sup> or how a criminal defense attorney should deal with the lying client.<sup>6</sup> This essay's scenarios present a different issue, namely whether an attorney—prosecutor or defense counsel—should call a witness primarily to prejudice the opposing party, with little regard for whether the testimony is really necessary to support his case or unduly prejudices the witness and/or the opposing party. Each of the scenarios presents an alternative method—the stipulation—that might meet the needs of the litigant without injecting unnecessary prejudicial information into the trial.

This essay introduces the scenarios to examine the customary conduct of attorneys and judges during criminal litigation. The applicable rules are identified, analyzed, and applied within the scenarios to discuss the role of

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3. See, e.g., Monroe H. Freedman & Abbe Smith, *Understanding Lawyer's Ethics* 296 (2d ed. 2002) (noting the inadequacy of rules of ethics and restatements "to establish rules of ethical conduct that are adequate to the special role [of prosecutors] that they so clearly recognize"); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. Ill. L. Rev. 1573, 1596 (noting that "[t]he existing provisions of Model Rule 3.8 address five aspects of prosecutorial conduct, but . . . they impose relatively little restraint on prosecutors and leave much troublesome conduct unaddressed").

4. See, e.g., Freedman & Smith, *supra* note 3, at 300 ("[C]onscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty."); Green, *supra* note 3, at 1588 ("[P]rosecutors are expected to bring prosecutions only when the guilt of the accused is sufficiently certain."); cf. Model Rules of Prof'l Conduct R. 3.8(a) (2002) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . .").

5. See, e.g., Freedman & Smith, *supra* note 3, at 294; see also R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 Notre Dame L. Rev. 635, 636 (2006); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469, 1469 (1966); Green, *supra* note 3, at 1596 (stating that "a prosecutor has a responsibility not to mislead the fact finder by casting doubt on the credibility of testimony the prosecutor knows to be truthful").

6. See, e.g., L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 Fordham L. Rev. 1707, 1710 (2007) ("It is difficult to imagine a more important topic at the very intersection of ethics and evidence than the ethical obligations of criminal defense lawyers when confronted with false testimony from their own client.").

lawyers in the litigation setting. This essay will show that attorneys are often confronted with situations in which the rules of evidence and ethics have been exhausted, and yet difficult evidentiary or ethical decisions remain. It does not purport to provide a thorough analysis of the provisions and use of particular rules because that undertaking would distract from the essay's focus. The essay eschews any discussion of the attorney's role in office practice. It is broader, though, than simply a discussion of tactical decision making in the litigation setting because it implicates the relationships of attorneys to the court and others, such as opposing parties, jurors, and witnesses.

Part I of this essay deals with Scenario 1, addressing potentially prejudicial motive evidence which generally is deemed relevant but unnecessary in homicide prosecutions. Within the scenario, this essay discusses the customary procedures, the roles of the parties and the judge (focusing primarily on the prosecutor), and the pertinent rules of evidence and ethics. Part II addresses Scenario 2, and employs the same approach used in Scenario 1 in examining evidence of a previous false claim in a rape case. Scenario 2, though, focuses principally on the defense attorney. Part III notes the difficulty of identifying beforehand the countless situations attorneys may face during litigation and the difficulty of drafting rules sufficiently detailed to be useful to attorneys and judges during trials, yet general enough to apply to the broad range of circumstances likely to be confronted. Nevertheless, some suggestions for strengthening the guidance to counsel during litigation are advanced in the conclusion.

For clarity, brevity, and convenience, when discussing evidence issues this essay focuses primarily on the Federal Rules of Evidence, but mentions state rules when they reinforce the analysis. In those areas of evidence law where significant disagreement over important issues exists, the various sides may be aired, but in most instances, there is substantial agreement about the rules within our focus. Regardless, the attorney in each scenario will be placed in a realistic predicament in which unresolved ethical questions remain after application of all evidence and ethics rules.

The first scenario is drawn from a capital murder case<sup>7</sup>:

*Scenario 1.* The socially prominent wife of a well-known physician stands charged with capital murder. The charge arises out of the brutal murder of her husband in their home by an individual allegedly hired by the wife to kill the husband. The prosecution asserts that the wife was motivated by her desire to obtain the husband's multimillion-dollar estate

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7. See *Wilson v. State*, 690 So. 2d 449 (Ala. Crim. App. 1995). In the interest of full disclosure, I report that prior to the defendant's trial, I was retained by the defense attorneys to brief them on several anticipated legal issues. I did not represent, counsel, or confer with the defendant in any way; I did not attend the trial; and I never directly or indirectly heard any confidential client communications. I disclose no defense secrets; in fact, I was not exposed to such secrets. In effect, I viewed my role as a "law consultant." See Tanina Rostain, *The Emergence of "Law Consultants,"* 75 *Fordham L. Rev.* 1397, 1398 (2006) (defining "law consultants," and noting that they decouple their services from the representation of clients).

and to continue her sexual liaisons with several men. Both the husband-victim and the wife are white. The prosecution will call a former paramour to the stand to testify to the liaisons. The witness is African-American,<sup>8</sup> and he was married, with children, at the time of his sexual liaisons with the defendant.

The second scenario was developed from several rape prosecutions<sup>9</sup>:

*Scenario 2.* A man is charged with rape, based on a woman's allegation that she was raped by an acquaintance during a date. She reported to the police that she and the man had been dating rather frequently for some period of time, and that the man sexually assaulted her when they returned to her home from a social event. During an ensuing police interrogation, the accused insisted that the sexual acts were consensual. He stated that after the sexual relations an argument ensued, and he departed. Shortly thereafter, she called the police and accused the man of rape.

To prove that the allegation is false, the defense will call a witness to prove that the prosecutrix made a previous false claim of rape. Both the current defendant and the prosecutrix are white. The potential witness is African-American.<sup>10</sup> He will testify to a similar experience with the prosecutrix when they were dating.

In each scenario, the opposing side will object to the offer of the potentially prejudicial evidence. The objection to the evidence will be overruled by the judge, and the opposing party will then offer to stipulate the relevant, essential details. A stipulation, as used in this context, is simply an agreement between litigating parties resolving an issue in the case.<sup>11</sup> A stipulation serves as proof and dispenses with the need to prove

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8. These facts closely track the actual facts from which the scenario was developed. The interracial nature of several adulterous relationships was seen by some observers as a potentially pernicious factor in the *Wilson* case. See, e.g., Jim Schutze, *By Two and Two* 56, 254 (1995) (characterizing one of the witnesses, an African-American, who had engaged in extramarital affairs with the defendant, as the State's "biggest gun in the entire trial"); *id.* at 258 (reciting cross-examination of the witness by a defense attorney: "Does it offend you that [the prosecutor] brought you here all the way from California because he thinks it's important for the jury to see that you are black?"). Although the Schutze book is a true-crime novel, it does provide support for certain factual and procedural aspects of the trial that otherwise are difficult to document at this late date other than by personal memories. Other writers have noted the use of race by attorneys. See, e.g., Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 *Fordham L. Rev.* 1585, 1587 (2007) ("[P]laying upon prejudices [of race or gender bias], particularly those of the American juror, is the trial attorney's bread and butter.").

9. See *State v. Alberts*, 722 N.W.2d 402 (Iowa 2006); *State v. Baker*, 679 N.W.2d 7 (Iowa 2004). The facts were modified or embellished as necessary to make the issues in Scenario 2 mirror the issues in Scenario 1.

10. The interracial factor is incorporated to mirror closely Scenario 1, which essentially is drawn from the actual facts of the *Wilson* case. Other characteristics, such as socioeconomic factors, extensive tattoos, or body piercings could be substituted. The inclusion of such factors is not intended to offend, but to inject a factor that might prejudice a litigant in the minds of some jurors. The defense in the *Wilson* case argued exactly that point. See *supra* note 8.

11. See, e.g., *People v. Woods*, 828 N.E.2d 247, 256 (Ill. 2005).

the facts by other means,<sup>12</sup> conclusively establishing the facts contained within them.<sup>13</sup> Stipulations, if appropriately drafted, thus eliminate unnecessary consumption of time by proving facts not disputed, and they may protect potential witnesses from needless embarrassment. Pertinent to this essay, stipulations prove the relevant facts without their more salient, irrelevant, and potentially prejudicial aspects biasing the jury.

Courts have reasons to favor stipulations—namely because they simplify issues, expedite trials, and reduce prejudice and costs.<sup>14</sup> Yet, although courts may favor stipulations, they are unlikely to force parties to stipulate essential facts. Even when a party seeks to stipulate to certain relevant facts, the court nevertheless may permit the opposing party to prove those facts despite the proffered stipulation.<sup>15</sup> Courts generally recognize that stipulations may not be as effective in presenting facts to juries—or even trial judges—as in-court testimony and other evidence.<sup>16</sup> Therefore, the courts customarily allow the parties “a large measure of discretion in deciding to accept or reject an offer to stipulate.”<sup>17</sup> Furthermore, in the criminal context, courts are not empowered to compel criminal defendants to stipulate facts, and they normally do not require prosecutors to stipulate important facts.<sup>18</sup>

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12. See, e.g., *id.*; *State v. Stevens*, 153 P.3d 903, 906 (Wash. Ct. App. 2007) (holding that, “once a defendant enters into a stipulation, he or she waives the right to require the government to prove its case on the stipulated element”).

13. See, e.g., *Old Chief v. United States*, 519 U.S. 172, 186 (1997) (“Old Chief’s proffered admission would, in fact, have been not merely relevant but seemingly conclusive evidence of the element.”); *Woods*, 828 N.E.2d at 256.

14. See, e.g., *In re Estate of Moss*, 248 N.E.2d 513, 516 (Ill. App. Ct. 1969); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:17, at 675 (3d ed. 2007) (“Stipulations can be a promising way to eliminate unnecessary risks of prejudice.”).

15. See, e.g., *United States v. Washington*, 705 F.2d 489, 498 (D.C. Cir. 1983) (*per curiam*) (noting that the proffered stipulation of identity “need not have been accepted by the government”); *Espinal v. Arias*, 916 A.2d 1081, 1086–87 (N.J. Super. Ct. App. Div. 2007) (holding that the trial court erred by requiring a party “to effectively stipulate to its own expert’s credentials”).

16. *Old Chief*, 519 U.S. at 187 (accepting as “unquestionably true” a lower court’s observation that a stipulation might “‘rob the evidence of much of its fair and legitimate weight’” (quoting *Dunning v. Maine Cent. R.R. Co.*, 39 A. 352, 356 (Me. 1897)). The Court held that “[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.” *Id.* at 189; see also *Washington*, 705 F.2d at 498–99.

17. *Washington*, 705 F.2d at 499; see also *State v. Francis*, 145 P.3d 48, 65 (Kan. 2006) (noting that “an offer to stipulate by either party to a criminal action need not be accepted by the other”).

18. See, e.g., *Old Chief*, 519 U.S. at 186–87 (recognizing “the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it,” but requiring prosecutors to accept certain stipulations addressing prior criminal convictions); *United States v. McCourt*, 468 F.3d 1088 (8th Cir. 2006) (holding that the defendant’s stipulation to the content of child pornography images did not prevent the prosecution from introducing a number of the video clips into evidence); *United States v. Walker*, 428 F.3d 1165, 1168 (8th Cir. 2005) (“*Old Chief* explicitly reaffirmed the rule that under most circumstances the prosecution is entitled to prove its case as it sees fit, and a criminal defendant may not ‘stipulate or admit his way

Yet proving the events by alternative means will raise, perhaps unnecessarily, both evidence and ethics issues. Should the other party reject the offered stipulation and proceed to present the evidence of motive or prior false claim, while the testimony may be relevant, the jury will likely draw prejudicial inferences not only from the conduct of the party on previous occasions but also from the characteristics of the witness. It is the dilemma of introducing collateral, perhaps unnecessary, evidence with its prejudicial nature or accepting a stipulation, which may be less effective in proving the party's case, that underlies the focus of this essay.

### I. SCENARIO 1

In Scenario 1, the prosecution seeks to prove that the defendant was motivated to murder her husband because—at least in part—she was engaging in extramarital sexual liaisons. Although relevant and potentially admissible,<sup>19</sup> motive is not an element of the offense of murder.<sup>20</sup> Thus, the prosecution is entitled, but not required, to prove motive. In a number of cases, courts have accepted evidence of extramarital affairs as proof of motive in homicide cases,<sup>21</sup> although some courts guard against its misuse.<sup>22</sup>

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out' of the full evidentiary force of the case against him." (quoting *Old Chief*, 519 U.S. at 186)); *Franklin v. State*, No. SC04-1267, 2007 WL 1774414, at \*11 (Fla. June 21, 2007) (upholding the trial court's rejection of the defense's offer to stipulate prior offenses in a capital murder sentencing proceeding, and permitting the prosecution to present certain details of those convictions through the testimony of witnesses); *Francis*, 145 P.3d at 65 (noting that "an offer to stipulate by either party to a criminal action need not be accepted by the other").

19. See, e.g., *People v. Buck*, 838 N.E.2d 187, 200 (Ill. App. Ct. 2005) ("[W]hile the prosecution is not obligated to prove motive, the State may introduce evidence that tends to show that an accused has a motive for killing the deceased."); *Gawn v. State*, 7 Ohio Cir. Dec. 19, 25 (1896) ("[T]he question of motive necessarily forces itself upon the mind in the investigation of every alleged criminal act.").

20. See, e.g., *People v. Thornton*, 161 P.3d 3, 38 (Cal. 2007) (discussing the trial court's instruction in a capital murder prosecution that "[m]otive is not an element of the crime charged and need not be shown" (quoting Cal. Jury Instr.—Crim. 2.51 (5th ed. 1988))); *Belcher v. State*, 961 So. 2d 239, 249 (Fla. 2007) (noting that "motive is not a required element of first-degree murder"); *Commonwealth v. Colon*, 866 N.E.2d 412, 428 n.17 (Mass. 2007) ("The jury need not have found any motive on the part of the defendant in order to convict him of murder in the first degree."); *State v. Wyant*, 597 N.E.2d 450, 453 (Ohio 1992) ("Motive, in criminal law, is not an element of the crime.").

21. See, e.g., *United States v. Russell*, 971 F.2d 1098, 1106–07 (4th Cir. 1992) (upholding the admission of extramarital sexual affairs evidence, and opining that the prior bad acts exceptions "are not to be construed narrowly"); *People v. Smith*, 203 P. 816, 821 (Cal. Dist. Ct. App. 1921) ("No rule is more firmly established than that, upon the trial for murder of husband or wife, evidence tending to show illicit relations of the accused with another is admissible to show lack of love and affection for the defendant's lawful spouse."); *Givens v. State*, 546 S.E.2d 509, 512 (Ga. 2001) (holding that evidence of a "close relationship" between defendant and a man was relevant to the homicide and therefore admissible); *Andrew v. State*, 164 P.3d 176, 191 (Okla. Crim. App. 2007) (upholding evidence of defendant's extramarital sexual affairs as "relevant to prove motive"); *Commonwealth v. Heller*, 87 A.2d 287, 289–90 (Pa. 1952) (approving the use of evidence of adultery to show a motive for murder); *State v. Johnson*, 743 S.W.2d 154, 158 (Tenn. 1987)



While the prosecution can offer evidence in order to prove a motive, and though some courts view motive evidence as quite probative of guilt,<sup>23</sup> proof of motive alone does not establish guilt.<sup>24</sup> Instead, motive serves as circumstantial evidence showing that a particular person had a reason to commit a criminal offense.<sup>25</sup> Put in context, testimony that the wife had extramarital affairs perhaps supports the prosecution's assertion that she had a motive to kill her husband, but it does not prove that she in fact did kill him. Other evidence is necessary to prove the murder and the defendant's culpability in the murder; the testimony about extramarital affairs only goes to prove the adultery.<sup>26</sup>

Turning our attention to the specific type of character evidence at issue in Scenario 1, modern evidence rules such as Federal Rule of Evidence 404(b) specifically authorize the use of character evidence to prove motive when

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(upholding admission of evidence of defendant's extramarital affair as tending "to bear upon appellant's possible motive for the homicide and his relationship with the victim"); *Reaves v. State*, 970 S.W.2d 111, 119 (Tex. App. 1998) (finding "within the 'zone of reasonable disagreement'" and therefore upholding the trial court's ruling that evidence of the defendant's extramarital affair was admissible (quoting *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991)); *Cantrell v. Commonwealth*, 373 S.E.2d 328, 337 (Va. Ct. App. 1988) (upholding the admission of sexual relationship evidence as "probative of a motive for the murder"). Even evidence of conduct subsequent to the murder may be admissible. *See, e.g., People v. Branion*, 265 N.E.2d 1, 4-5 (Ill. 1970) (upholding the admission of testimony about the defendant's visit to an alleged paramour's apartment the day after the homicide "because it tended to prove motive"); *State v. Booker*, 434 P.2d 801, 807-08 (Kan. 1967) (upholding the use of testimony about the defendant's behavior subsequent to the homicide).

One court, though, has noted that "[t]here is a general paucity of cases throughout the country discussing the issue of adultery as evidence of motive to kill one's spouse." *Camm v. State*, 812 N.E.2d 1127, 1132 (Ind. Ct. App. 2004). Nevertheless, as the *Reaves* court noted, "In the common experience of mankind, this is an oft repeated motive for homicide." 970 S.W.2d at 118. *But cf. Greene v. Commonwealth*, 197 S.W.3d 76, 87 (Ky. 2006) ("Evidence of immorality would not tend to prove a propensity or predisposition to commit homicide." (quoting *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999))).

22. *See, e.g., Camm*, 812 N.E.2d at 1127 (reversing defendant's conviction of three counts of murder based upon the court's view that under the facts of the case, the prosecution's evidence of the defendant's adulterous conduct was impermissible character evidence and not proper evidence of a motive for murder); *Lesley v. State*, 606 So. 2d 1084 (Miss. 1992) (reversing the conspiracy to murder conviction because the trial court erred in permitting the prosecution to present evidence of the defendant's extramarital affairs which the court deemed remote, irrelevant, and prejudicial).

23. *See, e.g., Lopez v. State*, 200 S.W.3d 246, 251 (Tex. App. 2006) ("Evidence showing motive to commit murder is a significant circumstance indicating guilt, and it is therefore relevant and admissible."); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Motive is a significant circumstance indicating guilt.").

24. *See State v. Nichols*, 689 N.E.2d 98, 102 (Ohio Ct. App. 1996) ("Motive alone is insufficient to convict.").

25. *See id.* ("Motive is a mental state which induces an act; it is a circumstantial fact used to strengthen an inference, drawn from other evidence, that an act was done [by the accused]."); *Baker v. State*, 97 N.W. 566, 570 (Wis. 1903) ("Motive is the reason which leads the mind to desire that result.").

26. *See Lesley*, 606 So. 2d at 1090 (noting similarly that, "[a]t best, prior extramarital affairs of [the defendant] may have proven her propensity to have another affair").

motive is a pertinent consideration.<sup>27</sup> Other bad acts evidence is a common form of the character evidence used to prove motive,<sup>28</sup> although if offered to prove propensity, other bad acts evidence generally is not admissible.<sup>29</sup> In this scenario, testimony about the extramarital affairs obviously constitutes evidence of other bad acts.

The prosecution likely will need to give notice to the defense that it intends to proffer the evidence,<sup>30</sup> and upon receiving the notice, the defense will seek to prevent its use by filing a motion in limine. The defense will argue a number of reasons why the evidence is inadmissible. These reasons are identified and discussed in the remaining portion of this part.

Although modern rules of evidence generally favor the admissibility of evidence, character evidence offered to prove conforming conduct generally is not admissible.<sup>31</sup> Naturally, there are exceptions to the general rule;<sup>32</sup> some character evidence is admissible.<sup>33</sup>

Character evidence ordinarily is disfavored, though, for a number of reasons.<sup>34</sup> It provides slight probative value, and carries a significant potential for unfair prejudice.<sup>35</sup> Because of its circumstantial nature in that

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27. See Fed. R. Evid. 404(b) (“Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive . . .”).

28. *Id.*

29. *Id.* (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).

30. See *id.*

Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive . . . provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

*Id.*

31. See Fed. R. Evid. 404(a) (stating that, except as otherwise provided in the Rule, “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion”).

32. See Fed. R. Evid. 404(a)(1)–(3) (stating exceptions to the Rule). Moreover, if character is an element at issue, Rule 404 does not bar its use because the Rule generally prohibits only character evidence offered to “prove action in conformity” with the actor’s asserted character or character trait.

33. See, e.g., *id.* (stating exceptions to the general rule of exclusion); Fed. R. Evid. 405(b) (authorizing the use of specific instances evidence if character is “an essential element of a charge, claim, or defense”); *United States v. Franco*, 484 F.3d 347, 352 (6th Cir. 2007) (observing that, in a case involving the subjective form of entrapment, “[b]ecause predisposition is relevant to entrapment, such character evidence was an essential element of Franco’s defense, and therefore, these specific instances of his conduct were admissible”); *World Wide Ass’n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132, 1138 (10th Cir. 2006) (noting that “it is well-established . . . that the character of the plaintiff in a defamation case is at issue”). For a general discussion on the issue of entrapment, see Joseph A. Colquitt, *Rethinking Entrapment*, 41 Am. Crim. L. Rev. 1389 (2004).

34. See, e.g., *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (listing a number of reasons for rejecting character evidence (citing *Michelson v. United States*, 335 U.S. 469, 475–76 (1948))).

35. Addressing “unfair prejudice” with respect to criminal defendants, the U.S. Supreme Court has stated that the term “speaks to the capacity of some concededly relevant evidence

it is not directly probative of the issues in the case, it also has the potential to distract and/or confuse a jury. There is also the concern that juries may punish people for their bad character (or reward people for their good character) rather than for the conduct that is the basis of the charge or the defense. Additionally, the presentation of character evidence takes time and may unduly extend the trial.

The court, upon being apprised of the prosecution's proffer and upon receipt of the defense's motion in limine, must decide whether or not to allow the presentation of the evidence. When a party seeks to introduce other bad acts evidence as proof of motive, a trial court generally will use a three-step process to determine its admissibility. First, the court will decide whether the proffered evidence is offered for a proper purpose pursuant to Rule 404(b).<sup>36</sup> Second, the court will determine whether the evidence is relevant. Third, the court will determine whether any undue prejudice exists that would substantially outweigh the probative value of the evidence through application of the Rule 403 balancing test.

The inquiry into proper purpose is rather narrow. The proffering party bears the responsibility of identifying a proper purpose for the evidence. In Scenario 1, this is not a difficult task because Rule 404(b) expressly provides the answer in this instance. It specifically lists proof of motive as a legitimate exception to the general exclusion of character evidence.

If the court determines that the purpose for which the prosecutor offers the evidence is legitimate, it must next address a second issue, namely, whether the evidence is relevant.<sup>37</sup> Although the party offering the evidence may assert a proper purpose, such as motive, it is for the court to say whether the evidence, if admitted, would in fact serve that purpose.

If the proffered evidence would not shed light on the issue of motive, it is not relevant and therefore should not be admitted.<sup>38</sup> If, though, the evidence would tend to prove or disprove motive, it is relevant and,

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to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Id.* at 180.

36. *See, e.g., Huddleston v. United States*, 485 U.S. 681, 686 (1988) ("The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character."). The Court in *Huddleston* also stated that, "first, . . . Rule 404(b) [requires] that the evidence be offered for a proper purpose." *Id.* at 691; *see also United States v. Tan*, 254 F.3d 1204, 1207 (10th Cir. 2001); *United States v. Hill*, 249 F.3d 707, 710 (8th Cir. 2001). Although the issue in *Hill* was the use of prior convictions to prove intent, and in *Tan* it was prior crimes evidence offered to prove malice, rather than other bad acts evidence addressed to motive, the decision process remains the same.

37. *See, e.g., Huddleston*, 485 U.S. at 689 ("Evidence is admissible under Rule 404(b) only if it is relevant."); *Tan*, 254 F.3d at 1207; *Hill*, 249 F.3d at 710; *Reaves v. State*, 970 S.W.2d 111, 118 (Tex. App. 1998) (noting that the proffer of motive evidence pursuant to Rule 404(b) "calls for a trial judge to make a rule 401 relevancy determination").

38. *See, e.g., State v. Osier*, 569 N.W.2d 441, 443-44 (N.D. 1997) (reversing the defendant's conviction based on a finding that "[a]dmission of the niece's testimony to show motive . . . cannot withstand scrutiny under Rule 404(b)" and concluding that the witness's "testimony was not relevant to a genuine issue regarding motive, scheme, plan, or any other listed exception under Rule 404(b)").

pursuant to Rule 404(b), at least conditionally admissible. This issue stands quite apart from the determination of whether the evidence is being offered for an appropriate purpose.

That which is relevant is admissible,<sup>39</sup> and it does not require much for evidence to be relevant. Succinctly stated, evidence is deemed relevant if it tends to prove or disprove a matter in dispute.<sup>40</sup> Given the relatively low threshold evidence must satisfy to be relevant, and in light of the fact that motive ordinarily is viewed as relevant in homicide cases, the court might tend to rule that the proffered evidence is admissible despite its troubling nature.<sup>41</sup> But before deciding to admit the evidence the court must address yet another issue.

In addition to the previously mentioned deficiency<sup>42</sup> of the evidence to prove complicity in the homicide, the evidence of adultery actually may prove not only too little but also too much. Even though the court has determined that the evidence is offered for a proper purpose and is relevant, the court must proceed to the third prong of the test, and conduct a weighing of its probative value and its potential for undue prejudice, confusion, or other factors of concern pursuant to Rule 403.<sup>43</sup> Although

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39. See Fed. R. Evid. 402.

40. See Fed. R. Evid. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). State rules define relevance in the same or quite similar language. See, e.g., Ala. R. Evid. 401 (using the same language); Mich. R. Evid. 401 (same); *People v. Davis*, 371 N.E.2d 456, 460 (N.Y. 1977) (same (quoting Unif. Rule of Evidence 401)). Thus, courts may permit evidence that “tends to show” a fact in issue. See, e.g., *State v. Craig*, 853 N.E.2d 621, 632 (Ohio 2006).

41. In addition to the low threshold for relevancy, trial judges also exercise broad discretion in determining whether the evidence—including motive evidence—is relevant. See, e.g., *Hill*, 249 F.3d at 710 (noting that courts “generally review the admission of Rule 404(b) evidence for abuse of discretion”); *People v. Norwood*, 841 N.E.2d 514, 522 (Ill. App. Ct. 2005) (upholding use of other crimes evidence to show motive, noting that the question of admissibility is “left to the trial court’s sound discretion,” and upholding the decision to admit the evidence “absent a clear abuse of discretion”); *Reaves*, 970 S.W.2d at 119 (declining to find abuse of discretion in the admission of evidence of an extramarital affair, and observing that “trial courts are given a limited right to be wrong as long as their decision is not ‘arbitrary and capricious’”). Moreover, an appellate court will not overrule the trial court’s decision unless the trial court’s ruling constitutes an abuse of discretion. See, e.g., *State v. Barnes*, 657 A.2d 611, 615 (Conn. 1995) (“Every reasonable presumption should be made in favor of the correctness of the court’s ruling in determining whether there has been an abuse of discretion.”); *State v. Stephen F.*, 152 P.3d 842, 844 (N.M. Ct. App. 2007) (holding that the trial court abused its discretion in barring testimony tending to prove the witness’s motive to lie); *Craig*, 853 N.E.2d at 633 (concluding that the trial court did not abuse its discretion in admitting other bad acts evidence). The court’s discretion, though, does not authorize the court to ignore the rules. Thus, although Rule 404(b) states that motive evidence “may . . . be admissible,” that phrase does not establish in the courts the discretion to reject motive evidence. See Fed. R. Evid. 404(b) advisory committee note (“[I]t is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion or waste of time.”).

42. See *supra* text accompanying notes 24–26.

43. See, e.g., *Huddleston v. United States*, 485 U.S. 681, 691 (1988) (“[P]rotection against such unfair prejudice emanates . . . from the assessment the trial court must make

relevant, the evidence is not admissible even for a permissible purpose if, for example, it would unfairly prejudice the opposing party, confuse the fact-finder, or unduly prolong the proceedings.<sup>44</sup> The mere fact that the evidence may prove injurious to the opposing party, though, is not an adequate reason to reject the evidence;<sup>45</sup> the issue is whether the potential prejudice substantially outweighs the probative value of the evidence.

Rather than merely proving the existence of a motive, it also proves a character fault—such as promiscuity or immorality—which potentially could be used by the jury to find that the defendant is an immoral or evil person, and that as a bad person she is more likely to commit criminal acts such as murder than is a person of good character.<sup>46</sup> In other words, the evidence of extramarital affairs may be used inappropriately by the jury as character evidence to show a propensity to engage in criminal activity.<sup>47</sup> This use, though, while factually possible, is legally impermissible. Therefore, if the jury uses the evidence to find that the wife is a person of evil nature, and thereby is more likely to have engaged in a homicide than if she had been a person of good character, the jury is using the bad acts evidence admitted to show motive to support a finding that she had a propensity to act in conformity with her bad character.

Nevertheless, because the courts ordinarily permit evidence of extramarital affairs to prove motive, the court likely will decide the three prongs—purpose, relevancy, and prejudice—of the test in favor of the prosecution,<sup>48</sup> and the court will deny the motion in limine.

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under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice.”); *United States v. Tan*, 254 F.3d 1204, 1207 (10th Cir. 2001); *Hill*, 249 F.3d at 710, 713; *Reaves*, 970 S.W.2d at 118 (noting that motive evidence offered pursuant to Rule 404(b) is subject to a Rule 403 inquiry).

44. Fed. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

45. See, e.g., *State v. West*, 149 A.2d 217, 221 (N.J. 1959) (pre-Rule 403 case stating “[t]hat evidence is shrouded with unsavory implications is no reason for exclusion when it is a significant part of the proof”).

46. See *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982) (Breyer, J.) (“Although . . . ‘propensity evidence’ is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance,” quoted in *Old Chief v. United States*, 519 U.S. 172, 181 (1997)). But cf. *Greene v. Commonwealth*, 197 S.W.3d 76, 87 (Ky. 2006) (“Evidence of immorality would not tend to prove a propensity or predisposition to commit homicide.”).

47. See Fed. R. Evid. 404(a) (“Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .”).

48. See, e.g., *People v. Norwood*, 841 N.E.2d 514, 522 (Ill. App. Ct. 2005) (upholding use of other crimes evidence to show motive and noting that the question of admissibility is “left to the trial court’s sound discretion,” and upholding the admission of evidence “absent a clear abuse of discretion”); *Reaves*, 970 S.W.2d at 119 (declining to find abuse of discretion in the admission of evidence of an extramarital affair, and observing that “trial courts are given a limited right to be wrong as long as their decision is not ‘arbitrary and capricious’”).

The prosecution will attempt to call as a witness an African-American man who, as previously stated, while married, engaged in sexual relations with the defendant. By calling the adulterer as a witness, perhaps unnecessarily, the prosecutor—intentionally or unintentionally—plays the “race card,” i.e., perhaps gratuitously supplying the jury with the race of the person with whom the defendant engaged in sexual activity, thus distracting the jury with extraneous and potentially prejudicial information.<sup>49</sup> Both the defendant and the witness seemingly will be impacted significantly by the prosecutor’s decision to offer evidence on the issue of motive.

At this point, in order to prevent the prosecution from presenting such a controversial witness, the defense will proffer a stipulation that the defendant engaged in several extramarital affairs in what she called an “open marriage.” By offering the stipulation, the defense counsel has once again injected a new variable that must be considered by both the prosecutor and the judge.<sup>50</sup>

It is unlikely that the court will require the prosecution to accept the stipulation, though sometimes, a court may do exactly that. One occasion for such a ruling involves the use of prior convictions. For example, in *Old Chief v. United States*, the U.S. Supreme Court determined that, in federal prosecutions, if a past conviction constitutes an element of the offense for

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*But see* Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (reversing defendant’s conviction of three counts of murder based upon the court’s view that under the facts of the case, the prosecution’s evidence of the defendant’s adulterous conduct was impermissible character evidence and not proper evidence of a motive for murder); Lesley v. State, 606 So. 2d 1084 (Miss. 1992) (reversing the conspiracy to murder conviction because the trial court erred in permitting the prosecution to present evidence of the defendant’s extramarital affairs which the court deemed remote, irrelevant, and prejudicial).

49. The significance of “playing the race card” has been recognized by a number of courts since it was propelled into prominence in the O.J. Simpson case. *See, e.g.*, F.J.W. Enters., Inc. v. Johnson, 746 So. 2d 1145, 1147 (Fla. Dist. Ct. App. 1999) (noting that “[t]his [the race card] has become a ‘buzz word,’ since the O.J. Simpson case, indicating that one has unnecessarily and improperly inserted the issue of race into a case”); *see also* People v. Houston-Irving, No. 035071, 2006 WL 2105875, at \*10 (Cal. Ct. App. July 31, 2006) (discussing an argument by counsel specifically accusing the other attorney of playing the race card by accusing a witness “of being a racist”); Calloway v. State, 784 A.2d 636 (Md. Ct. Spec. App. 2001) (discussing final arguments in which both sides addressed the “race card” issue).

50. *See, e.g.*, *Old Chief*, 519 U.S. at 182–84.

As for the analytical method to be used in Rule 403 balancing . . . a second approach would start out like the first but be ready to go further. On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. . . . [A] judge applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point . . . .

*Id.* at 182–83. The Advisory Committee notes to Rule 401 explicitly state that a party’s concession is pertinent to the court’s discretion to exclude evidence on the point conceded).

which the defendant is charged, the defendant can stipulate to the fact of the conviction, and thereby prevent the prosecution from proving the conviction by other means.<sup>51</sup> The Court in *Old Chief*, though, emphasized the fact that prosecutors must be allowed to prove their cases by “colorful” evidence,<sup>52</sup> and, as a result, courts have been slow to embrace the *Old Chief* holding, while a number of courts have sought to apply it narrowly.<sup>53</sup> For example, many courts view the *Old Chief* ruling as addressing only prior conviction evidence and not as reaching other bad acts evidence.<sup>54</sup> Therefore, in practice, prosecutors need not accept defense-offered stipulations,<sup>55</sup> and the decision of whether to accept or reject the stipulation effectively will rest solely with the prosecutor.

Even if the evidence is admissible, a significant question remains, namely, should the prosecutor offer it? Prosecuting attorneys who believe the evidence supports the guilt of an accused have every reason to seek a conviction. But in seeking a conviction, the prosecutor still plays a role in ensuring that the defendant receives a fair trial,<sup>56</sup> as prosecutors bear additional, special responsibilities.

Prosecutors are expected to prosecute their cases forcefully, but only while being fair to the accused.<sup>57</sup> Alternatively speaking, prosecutors must seek both to convict the guilty and to exonerate the innocent.<sup>58</sup> Thus,

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51. *Id.* at 174.

52. *Id.* at 186–87.

53. *See, e.g.,* United States v. Hill, 249 F.3d 707, 713 (8th Cir. 2001) (concluding that “the rationale for the limited rule of *Old Chief* disappears” when a stipulation addresses an element of the crime rather than the defendant’s criminal status); State v. Ball, 756 So. 2d 275, 278–80 (La. 1999) (stating a number of reasons for distinguishing and refusing to follow *Old Chief*).

54. *See, e.g.,* United States v. Crowder, 141 F.3d 1202, 1209 (D.C. Cir. 1998) (reviewing *Old Chief* and holding “that a defendant’s offer to stipulate to an element of an offense does not render the government’s other crimes evidence inadmissible under Rule 404(b) to prove that element, even if the defendant’s proposed stipulation is unequivocal”); *see also* Hill, 249 F.3d at 713. In *Old Chief*, the Court noted that, “[i]n sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away rests on good sense.” 519 U.S. at 189.

55. *See Old Chief*, 519 U.S. at 183 (“[A] defendant’s Rule 403 objection offering to concede a point generally cannot prevail over the Government’s choice to offer evidence showing guilt and all the circumstances surrounding the offense.”); Ball, 756 So. 2d at 280 (noting that to force the prosecution to accept a proffered defense stipulation would frustrate the general rule that “[t]he State cannot be robbed of the moral force of its case merely because the stipulation is offered” (quoting State v. Watson, 449 So. 2d 1321, 1326 (La. 1984))).

56. *See* State v. Ferrone, 113 A. 452, 455 (Conn. 1921) (“If the accused be guilty, he should none the less be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe.”).

57. *See* Handford v. United States, 249 F.2d 295, 296 (5th Cir. 1958) (noting that federal prosecutors bear the dual duties to prosecute zealously and to be fair to the accused); Ferrone, 113 A. at 455 (observing that prosecutors engaged in litigation “should be forceful, but fair”); People v. Pelchat, 464 N.E.2d 447, 451 (N.Y. 1984) (opining that a prosecutor “owes a duty of fair dealing to the accused”).

58. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (observing that federal prosecutors represent the government, “whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done”); Ferrone, 113 A. at 455 (noting that

prosecutors should prosecute their cases vigorously, but only if they believe that justice will attend the convictions.<sup>59</sup> Moreover, in prosecuting cases, vigorous though they may be, prosecutors should not violate rules or utilize unfair methods.<sup>60</sup>

In this instance, the motive evidence is highly prejudicial, not only because it involves extramarital affairs, but also because of the multiracial nature of the relationship.<sup>61</sup> Moreover, the probative value of adultery evidence is drawn into question by data which fail to show that a significant percentage of adulterers murder their spouses. Although marital infidelity is widespread, few—comparatively very few—adulterers murder their spouses. Therefore, in this instance, the probative value of motive evidence is questionable, and the potential for undue prejudice is great.<sup>62</sup>

In assessing probative value, it is noteworthy that some cases and scholarly writers opine that adultery is quite common.<sup>63</sup> Courts and

prosecutors “seek impartial justice for the guilty as much as for the innocent”); *Pelchat*, 464 N.E.2d at 451 (noting that prosecutors are “charged with the duty not only to seek convictions but also to see that justice is done”).

59. See Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-1.2(c) (3d ed. 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”); Model Rules of Prof’l Conduct R. 3.8 cmt. 1 (2002) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); Nat’l Prosecution Standards Standard 1.1 (Nat’l Dist. Att’ys Ass’n, 2d ed. 1991) (“The primary responsibility of prosecution is to see that justice is accomplished.”); see also *Berger*, 295 U.S. at 88 (observing that “the twofold aim of [federal prosecutors] is that guilt shall not escape or innocence suffer”); *Handford*, 249 F.2d at 296 (noting that federal prosecutors bear the dual duties to prosecute zealously and to be fair to the accused); *People ex rel. N.R.*, 139 P.3d 671, 683 (Colo. 2006) (“A district attorney is further bound by standards of conduct unique to public prosecutors: her duty is to seek justice, not merely to convict.”).

60. See *Berger*, 295 U.S. at 88 (noting that, “while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one”).

61. See *supra* note 8.

62. See *Baker v. State*, 97 N.W. 566, 569 (Wis. 1903). In this case, other bad acts evidence was received by the trial court on the issue of fraudulent intent. The state supreme court, in reversing the conviction, explained,

We now come to the errors assigned upon the admission of evidence, which are very numerous, but not more so than is warranted by the extraordinary flights of inquiry in which the trial court indulged the state’s counsel. Much of the objected testimony consisted of narratives of conversations with and conduct of the accused on other and remote occasions, so interlarded with gossipy or scandalous suggestion and innuendo as to indicate the purpose of the witnesses, if not of counsel, to degrade and discredit her in the esteem of the jury. Any such attempt on the part of counsel in the trial of any case, but especially of the attorney for the state in a criminal prosecution, is highly improper, and should be promptly checked by the trial court. . . . It is no more proof of the fraudulent intent than of the other elements of the crime that accused is of loose morals or general dishonest tendencies.

*Id.* at 569–70.

63. See, e.g., *Jaunese v. State*, 701 N.E.2d 1282, 1284 (Ind. Ct. App. 1998) (“Unfortunately, extramarital affairs are all too common in today’s society.”); Phyllis Coleman, *Who’s Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 Ind. L. Rev. 399 n.2 (1991) (“[A]ffairs are extremely common.” (quoting Luann Linquist, Secret



scholars cite studies of the level of marital infidelity in legal and social science literature to the effect that perhaps a majority of spouses engage in extramarital sexual liaisons.<sup>64</sup> The figures range from a high of 70% of men and 50% of women cheating on their spouses<sup>65</sup> to more conservative estimates that 25% of married men and 15% of married women have engaged in adultery.<sup>66</sup> Some of these statistics are challenged,<sup>67</sup> but even the challengers note a significant level of adultery in America today.<sup>68</sup> Scholars estimate that about 2% of married couples view their marriage as “open,” which means that some 900,000 married couples are believed to be in an “open marriage.”<sup>69</sup>

Therefore, despite its wide acceptance as circumstantial evidence of a motive to kill, proof of extramarital affairs sheds little light on the actual culpability *vel non* of the accused with regard to the homicide. Even if

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Lovers, at xi (1989)); Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 Temp. L. Rev. 645, 679 (2003) (“Some studies show that today adultery is quite common . . .”).

64. See, e.g., *Jaunese*, 701 N.E.2d at 1284 n.3 (citing statistics from articles, including Coleman, *supra* note 63, and Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. Fam. L. 45 (1991)); Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 Geo. Wash. L. Rev. 165, 215 (2007) (observing that perhaps fifty percent of married adults have committed adultery); Coleman, *supra* note 63, at 412 (noting that “a majority of married people have affairs”); Siegel, *supra* at 55 (“Most American marriages include extramarital sex by at least one of the partners. Half of all husbands report having committed adultery. . . . Somewhere between a third to forty percent of all wives say they have been unfaithful . . .”); Jennifer A. Herold, Note, *A Breach of Vows but Not Criminal: Does Lawrence v. Texas Invalidate Utah's Statute Criminalizing Adultery?*, 7 J. L. & Fam. Stud. 253 (2005) (“[S]tudies suggest that nearly fifty percent of married men and women have engaged in adultery.”).

65. See Coleman, *supra* note 63, at 399 n.2; Gruber, *supra* note 63, at 679 n.161 (“According to one study, approximately 70% of married men cheat on their wives, and 50% of married women cheat on their husbands.”); Nehal A. Patel, Note, *The State's Perpetual Protection of Adultery: Examining Koestler v. Pollard and Wisconsin's Faded Adultery Torts*, 2003 Wis. L. Rev. 1013, 1015 (“The most reputable social science surveys reveal that at least twenty to fifty percent of American adults admit to committing adultery, and some studies estimate the adultery rate to be as high as seventy percent.”).

66. See Bradford Bigler, Comment, *Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation*, 53 UCLA L. Rev. 783, 805 & n.112 (2006) (citing several studies and quoting one source to the effect that “adultery statistics are hotly debated,” noting a “relatively high incidence of marital infidelity,” and providing conservative estimates).

67. See, e.g., Lynn D. Wardle, *Parental Infidelity and the “No-Harm” Rule in Custody Litigation*, 52 Cath. U. L. Rev. 81, 93 (2002) (“The best evidence indicates that while the incidence of marital infidelity is much lower than commonly described in tabloids, supermarket check-stand magazines, and television talk shows, it nevertheless occurs in many marriages.”). Wardle quotes Tom Smith of the University of Chicago's National Opinion Research Council, as opining that “[t]he best estimates are that about . . . 15–17% of ever-married people have had a sexual partner other than their spouse while married.” *Id.* at 94.

68. See, e.g., Wardle, *supra* note 67, at 93 (noting that marital infidelity “occurs in many marriages”). “[I]t is fair to infer that somewhere between twenty-one and thirty-seven percent of all married men and between twelve and twenty percent of all married women will engage in sexual infidelity during their marriages.” *Id.* at 95.

69. See Siegel, *supra* note 64, at 56 (quoting Brian G. Gilmartin, *The Gilmartin Report* 11 (1978)).

“only” one-third of husbands and one-fifth of wives engage in extramarital sexual relations, the probative value of adultery evidence in homicide prosecutions seems somewhat tenuous given the fact that few of these adulterous spouses will kill their spouses. On the other hand, the public strongly disapproves of adultery,<sup>70</sup> which potentially increases the prejudicial nature of extramarital sexual liaisons evidence. Moreover, by diverting the jury’s attention from the principal issues, the evidence may lead to confusion or erroneous fact-finding.

In light of these deficiencies, and because modern rules of evidence are biased in favor of the admissibility of evidence<sup>71</sup>—such that the majority of courts will permit the use of other acts adultery evidence regardless of those deficits—should the prosecutor take it upon herself to reconsider use of the evidence before presenting it to the jury? And if so, what guidance does she have, absent explicit instruction in the rules, to decide whether to accept the stipulation?<sup>72</sup> Alternatively, should she proffer the evidence and leave it to the court to mitigate its prejudicial nature?

The only real tool available to the court to mitigate the prejudice, outside of accepting the stipulation, is a limiting instruction,<sup>73</sup> the utility of which is

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70. See, e.g., Siegel, *supra* note 64, at 55–56 (“Despite the prevalence of extramarital activity, the vast majority of people criticize departures from monogamy: ‘In the latest available survey, 87% said that extramarital relations were “always wrong” or almost always wrong.’” (quoting Lynn Atwater, *The Extramarital Connection* 15 (1982))); Wardle, *supra* note 67, at 95 (“Opinion surveys also indicate that even in today’s ‘liberated’ sexual atmosphere, most Americans still consider adultery to be immoral.”); Herold, *supra* note 64, at 253 (noting that “the majority of Americans find adultery morally wrong”); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 *Suffolk U. L. Rev.* 837, 839 n.19 (2006) (“Unless a married person is separated from his or her spouse, nine in [ten] people believe it’s always or at least almost always wrong to have sex with someone else.” (quoting a USA Today/CNN/Gallop poll) (internal quotation marks omitted)).

71. See, e.g., *United States v. Tan*, 254 F.3d 1204, 1211 (10th Cir. 2001) (stating that “exclusion of evidence under Rule 403 that is otherwise admissible under the other rules ‘is an extraordinary remedy and should be used sparingly’” (internal quotation marks omitted)); *Lopez v. State*, 200 S.W.3d 246, 252 (Tex. App. 2006) (observing that the “court should favor admission in close cases” when courts weigh evidence pursuant to Rule 403).

72. She also has the option to offer an alternative stipulation of the single witness in lieu of calling that witness, and then persisting with the presentation of other evidence of the defendant’s adultery.

73. See *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988) (noting that the protection against undue prejudice emanates from the availability of a limiting instruction which informs the jury that “similar acts evidence is to be considered only for the proper purpose for which it was admitted”). Limiting instructions are addressed by Federal Rule of Evidence 105. Cautionary instructions are normally given only when requested by a party, and the failure to give limiting instructions sua sponte rarely will be deemed error. See, e.g., *Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 820 (6th Cir. 2007) (stating that, in absence of a request for a limiting instruction, the court reverses only for the “very high standard” of plain error); *Ex parte Martin*, 931 So. 2d 759, 760 (Ala. 2004) (holding that the failure to give a limiting instruction absent a request did not constitute plain error); *State v. Athan*, 158 P.3d 27, 41 (Wash. 2007) (observing that “the failure of a court to give a limiting instruction is not error when no instruction was requested”). Attorneys in the exercise of professional judgment may elect not to request such an instruction for a number of reasons. See, e.g., *Ståte v. Wach*, 24 P.3d 948, 953 (Utah 2001) (noting that the trial court offered to

questionable at best.<sup>74</sup> Despite the potential for such misuse of evidence by the fact-finders, and the perceived ineffectiveness of cautionary instructions, courts still seemingly emphasize the presumption of admissibility, especially when prejudicial evidence is accompanied by a limiting instruction.<sup>75</sup> Nonetheless, this approach permits evidence that carries with it a heightened level of unfair prejudice to be routinely introduced to juries who may not restrict the evidence to its court-designated purpose.<sup>76</sup>

The question, then, is how does the prosecutor act as a minister of justice if she rejects a stipulation that would establish the fact of extramarital affairs without injecting the issue of race or causing needless harm to a witness? The short answer may be that she does not.

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give a curative instruction, but that the defendant's attorney declined the offer and argued an instruction likely would emphasize the matter to the jury). Yet if the evidence is significantly prejudicial, the court should consider giving a cautionary instruction *sua sponte* unless the prejudiced party objects. *See, e.g.,* Albrecht v. Horn, 485 F.3d 103, 127 (3d Cir. 2007) (observing that "counsel might reasonably conclude that such an instruction might inadvertently call attention to the evidence of prior bad acts"). The failure to give a cautionary instruction *sua sponte*, though, may be error in some instances. *See, e.g.,* People v. Pichardo, 825 N.Y.S.2d 603, 605 (App. Div. 2006) (referring to the statement of a nontestifying codefendant, the court stated that, "[a]lthough defendant did not request a limiting instruction, we conclude under the circumstances of this case that the failure to give such an instruction is a fundamental error that warrants reversal and a new trial").

74. *See* Krulewicz v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (citations omitted)). Nevertheless, the prosecutor might consider a limiting instruction as a tool to mitigate the impact of the motive evidence if she is weighing its impact. *See* Fed. R. Evid. 403 advisory committee note (noting that, "[i]n reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction").

75. It also should be noted that when attorneys, prosecutors, or judges are assessing the potential prejudicial impact of evidence prior to offering or admitting the evidence, the efficacy of a limiting instruction is difficult to measure in light of the fact that the party against whom the evidence is offered may either choose not to request a cautionary instruction or oppose the giving of such an instruction. *See, e.g.,* Wach, 24 P.3d at 953 (noting that the trial court offered to give a curative instruction, but that the defendant's attorney declined the offer and argued an instruction likely would emphasize the matter to the jury).

76. *See* Peter W. Agnes, Jr., *An Ounce of Prevention Is Worth a Pound of Cure: A Collaborative Approach to Eliminate Improper Closing Arguments*, 87 Mass L. Rev. 33, 40 (2002).

In another context, then Justice Hennessey of the Supreme Judicial Court observed that courts should be "skeptical as to the effectiveness of limiting instructions" in circumstances in which the evidence has a high potential for unfair prejudice. Yet despite the fact that the problem of ineffectual curative instructions has been known to exist for many years and there is an emerging body of empirical data that indicates that curative instructions do not work, appellate courts continue to presume that curative instructions repair the harm caused by improper arguments.

*Id.* (citing Commonwealth v. DiMarzo, 308 N.E.2d 538, 546 (Mass. 1974) (Hennessey, J., concurring)).

## II. SCENARIO 2

In Scenario 2, the defense seeks to prove that the prosecuting witness (the prosecutrix) has falsely accused the defendant of rape. The defense will offer evidence of a prior false accusation of rape by the prosecutrix against another man both to discredit her as a witness and to show that she had a motive (i.e., anger, retaliation) to lie about the accused when she claimed that he had raped her.

As in the first scenario, in compliance with the requirement of the jurisdiction's rape-shield provision,<sup>77</sup> the defense will give notice of its intent to present evidence of the prior false claim. During cross-examination of the prosecutrix, the defense will attempt to impeach the prosecutrix by asking her about the previous false claim of rape.<sup>78</sup> If she admits the fact that she falsely accused a person of rape on a different occasion, her testimony is at least partially discredited and the jury will be instructed that they can use the admission of the prior false claim against her when weighing the believability of her testimony. The defense, though, will further press the issue during its case by calling as a witness the man falsely accused by the prosecutrix on the previous occasion, who will testify that he dated the woman for a period of time and that on a previous occasion she claimed he had raped her. He will say that after engaging in consensual sexual relations, they had an argument. He departed, and she called the police and had him arrested. The charges were later dropped when she recanted her accusation and refused to cooperate with the prosecution.

The prosecution will seek to prevent the use of the evidence by filing a motion in limine, and will argue that the evidence is not admissible pursuant to the jurisdiction's rape-shield law. Moreover, if the judge determines that the evidence is not precluded by the rape-shield law, the State will argue that even though relevant, its probative value is significantly outweighed by its prejudicial effect. The prejudice, according to the prosecutor, comes not only from the evidence of prior bad acts by the prosecutrix, which are not directly connected with the present charge of rape, but also from the multiracial nature of the prosecutrix's prior relationship with the proposed witness.<sup>79</sup>

Just as in Scenario 1, upon the initial objection by the prosecutor, the judge will have to determine the admissibility of the evidence. Three issues attend that effort. First, the rape-shield law may prevent the use of the evidence. Second, insofar as the evidence is used for impeachment,

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77. See, e.g., Fed. R. Evid. 412(c)(1)(A) (notice requirement); Ala. R. Evid. 412(d)(1) (same); Wash. R. Evid. 412(d)(1)(A) (same).

78. See Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . .").

79. See *supra* note 10 (identifying the reason for the inclusion of race in the scenario).

extrinsic evidence of prior conduct generally is not admissible.<sup>80</sup> Third, for the purposes of our analysis, the prosecutrix will already have admitted during cross-examination that she falsely accused another man of rape. Thus, the man's testimony is redundant and arguably unnecessary.

Again, as already discussed with regard to motive evidence in Scenario 1, the judge will determine and weigh the purpose, relevancy, and potential prejudice of the evidence before admitting the evidence. Because similar testing of the evidence was discussed with regard to Scenario 1,<sup>81</sup> that discussion will not be repeated here. Scenario 2, though, does present an additional issue, namely the impact of rape-shield law.

At least to some extent, modern rules of evidence protect the victim of a crime from an assault on his or her character by the criminal defendant. Although Rule 404(a)(2) does permit a criminal defendant to introduce certain pertinent types of character evidence to attack a victim's allegations, Rule 412's more stringent victim protection prevails in sex-offense cases such as Scenario 2.

While rape-shield rules vary by jurisdiction, the statutes or rules generally prohibit the use of a victim's character propensity evidence involving sexual conduct in litigation, including the sexual history of the alleged victim of a rape or other sexual assault.<sup>82</sup> These rules exist in the federal system<sup>83</sup> and across the states<sup>84</sup> to protect victims of rape or other sexual offenses from the humiliation of having their sexual history presented in a public forum.<sup>85</sup> Where the history is unrelated to the charge,

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80. See Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."). Thus, as described by one writer, Rule 608(b) "leaves the perjury henhouse unguarded." Gerald L. Shargel, *Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 *Fordham L. Rev.* 1263, 1264 (2007).

81. See *supra* text accompanying notes 36-48.

82. Prior to the enactment of rape-shield laws, some states permitted criminal defendants charged with rape to produce evidence of the bad reputation for sexual promiscuity of the prosecutrix in an attempt to prove that the victim consented to the alleged intercourse. See, e.g., *Knox v. State*, 365 So. 2d 349, 350 (Ala. Crim. App. 1978) (discussing the common law and rape-shield statute, and upholding the trial judge's ruling barring the defendant's attempt to bring up "specific acts or conduct of the prosecutrix with third persons").

83. See Fed. R. Evid. 412.

84. See, e.g., Ala. R. Evid. 412; Minn. R. Evid. 412; Tex. R. Evid. 412; Wash. R. Evid. 412.

85. See, e.g., Fed. R. Evid. 412 advisory committee note ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process."); *United States v. Bordeaux*, 400 F.3d 548, 558 (8th Cir. 2005) (stating that "the purpose" of Rule 412 "is to protect the alleged victims of sexual assault from harassment or embarrassment"). Professor Aviva Orenstein describes evidence of a victim's sexual history as "technically irrelevant, but practically explosive." Orenstein, *supra* note 8, at 1599.

the conduct is deemed irrelevant to the accused's guilt in the instant case.<sup>86</sup> Moreover, the evidence presents a significant risk of confusing or misleading the jury in the fact-finding process.<sup>87</sup> Thus, where the accused claims the encounter was consensual and seeks to prove that the alleged victim has engaged in sexual activities with anyone other than the accused in the past, the defendant is offering character evidence to prove propensity on the part of the victim to engage in consensual sexual activity. Evidence offered for that purpose is inadmissible.<sup>88</sup> While the evidence is logically relevant, it is being offered for an impermissible purpose. But for the existence of such rape-shield provisions, though, criminal defendants would regularly seek to introduce evidence of a victim's sexual promiscuity.<sup>89</sup>

Exceptions to the prohibition of prior sexual history evidence do exist,<sup>90</sup> and of these exceptions, the "false-claims exception"<sup>91</sup> is directly implicated by the facts of Scenario 2. Federal Rule of Evidence 412 and its state counterparts generally do not reach prior false claims of sexual assaults.<sup>92</sup> Some state rules, however, do contain a specific provision governing false-claims evidence.<sup>93</sup> In jurisdictions without such specific provisions, some courts have determined that evidence of prior false claims do not fall within the definition of prior sexual conduct protected by the

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86. Courts view these concerns as legitimate *raison d'être* for rape-shield statutes. *See, e.g., Michigan v. Lucas*, 500 U.S. 145, 149–50 (1991) ("The Michigan [rape-shield] statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) ("This interest in protecting the victims of sexual violence from humiliation, among other injuries, has prompted states to pass rape shield laws . . .").

87. *See State v. Gregory*, 147 P.3d 1201, 1215 (Wash. 2006) ("The [rape-shield] statute clearly contemplates that where there is a substantial danger of undue prejudice to the truth finding process, such evidence will be excluded.").

88. *See Fed. R. Evid.* 412. But in cases in which consent is an issue, evidence that the alleged victim engaged in consensual sexual relations with the accused on other occasions is permissible. *Fed. R. Evid.* 412(b)(1)(B).

89. *See, e.g., Knox v. State*, 365 So. 2d 349, 350 (Ala. Crim. App. 1978) (noting that prior to the enactment of a rape-shield statute, criminal defendants charged with rape could offer evidence of the prosecutrix's bad reputation for sexual promiscuity as part of a defense that the alleged victim consented to the intercourse).

90. *See, e.g., Fed. R. Evid.* 412(b).

91. *See, e.g., Wis. Stat. Ann.* § 972.11(2)(b)(3) (West 2007) (providing as an exception to the general exclusion of evidence concerning a complaining witness's prior sexual conduct "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness"). *But see Redmond v. Kingston*, 240 F.3d 590, 592 (7th Cir. 2001) (addressing the Wisconsin rape-shield statute and stating that "[t]he false-charge 'exception' to the rape-shield statute is not really an exception, but rather a reminder of the limited meaning of 'sexual conduct' as defined in the statute").

92. *See e.g., Wis. Stat. Ann.* § 972.11(2)(b)(3).

93. *See, e.g., Va. Code Ann.* § 18.2-67.7B (2004) ("Nothing contained in this section shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused."); *Wis. Stat. Ann.* § 972.11(2)(b)(3) (providing as an exception to the general exclusion of evidence concerning a complaining witness's prior sexual conduct "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness").

rape-shield provision.<sup>94</sup> In fact, a majority of the state courts that have addressed this issue have determined that false-claims evidence is not prohibited per se by their rape-shield laws.<sup>95</sup> Some have limited this exception to credibility;<sup>96</sup> others permit substantive evidence of false claims.<sup>97</sup>

The difference between the two positions is significant.<sup>98</sup> The defense, of course, is entitled to impeach prosecution witnesses, but if the evidence of false claims is only available to attack credibility, the defendant, in seeking to discredit the victim, generally will be limited to asking questions on cross-examination about the prior false claims and will be bound by the

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94. See, e.g., *State v. Alberts*, 722 N.W.2d 402, 410 (Iowa 2006) (“[A] falsity determination simply means the statements are not ‘past sexual behavior’ within the meaning of our rape-shield law.”); *State v. Long*, 140 S.W.3d 27, 30 n.3 (Mo. 2004) (“Evidence of prior complaints, as opposed to prior sexual conduct, is not rendered inadmissible by” the rape-shield statute); *State v. Boggs*, 588 N.E.2d 813, 817 (Ohio 1992) (“Because prior false accusations of rape do not constitute ‘sexual activity’ of the victim, the rape-shield law does not exclude such evidence.”); *Clinebell v. Commonwealth*, 368 S.E.2d 263, 264 (Va. 1988).

In the present case, *Clinebell* does not seek to prove that his daughter has engaged in “prior sexual conduct” or that she has an unchaste character. He seeks to prove for impeachment purposes that his daughter makes false statements concerning sexual behavior. We conclude that such statements are not “conduct” within the meaning of Code § 18.2-67.7, and therefore, the section is inapplicable.

*Id.* Although the Virginia rape-shield statute was enacted in 1981, the Virginia court did not rely on subsection B of the statute, but determined instead that the proffered evidence did not fall within the statute’s definition of sexual conduct. See *id.* at 264. At least one court has noted “the difficulty in determining what sexual behavior is for the purposes of” that state’s rape-shield law. *Alberts*, 722 N.W.2d at 408. The Ohio Supreme Court, though, has limited the false claims exception to incidents in which no sexual conduct was involved. See *Boggs*, 588 N.E.2d at 816 (“False accusations, where no sexual activity is involved, do not fall within the rape-shield statute.”). The *Boggs* court also stated that “[o]nly if it is determined that the prior accusations were false because no sexual activity took place would the rape-shield law not bar further cross-examination.” *Id.* at 818. The focus in such cases, though, should be on the false claim, not on accompanying sexual conduct, if any. Therefore, the exception should apply regardless of whether sexual conduct accompanies the false claim. See, e.g., Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant’s Past Sexual Behavior*, 44 Cath. U. L. Rev. 709, 770 (1995) (“A prior false accusation is not ‘sexual conduct,’ thus the statute should not protect the complainant from exposure of prior lies or falsehoods.”).

95. See *State v. Barber*, 766 P.2d 1288, 1289 (Kan. Ct. App. 1989) (“We are persuaded to join the majority of jurisdictions which have considered the question and hold the rape-shield statute simply does not apply.”); *Clinebell*, 368 S.E.2d at 265. In fact, one court has observed that “[v]irtually all cases considering the issue have found that false claims of prior sexual conduct do not fall within the coverage of rape-shield laws.” *State v. Baker*, 679 N.W.2d 7, 10 (Iowa 2004).

96. See *Clinebell*, 368 S.E.2d at 265 (observing that in some states “evidence of prior false accusations is admissible to impeach the complaining witness’ credibility,” and listing fourteen state cases in support).

97. See *id.* (noting that in some states “evidence of prior false accusations is admissible . . . as substantive evidence,” and listing five state cases in support).

98. See, e.g., *Quinn v. Haynes*, 234 F.3d 837, 845 (4th Cir. 2000) (noting that “[t]he distinction between impeachment evidence proving bias and impeachment evidence of general credibility is important,” and discussing the difference in permissible proof).

victim's answers.<sup>99</sup> In this situation, extrinsic evidence commonly would not be admissible.<sup>100</sup> If, however, the evidence of prior false claims is available to prove bias or motive, extrinsic evidence may well be admissible during the opposing party's case in chief.<sup>101</sup>

Therefore, in Scenario 2, the judge will at least permit the defense to cross-examine the prosecutrix about the previous false claim of rape,<sup>102</sup> and as in a number of jurisdictions, the judge will authorize the defense to call as a witness the person previously accused by the prosecutrix of rape.<sup>103</sup> Following such a ruling in favor of the defense, the prosecution will proffer a stipulation that the prosecutrix previously claimed falsely that she was raped by another man in order to prevent the defense from presenting detailed evidence of the prejudicial conduct of the prosecutrix.

99. See, e.g., *id.*; *State v. Cox*, 468 A.2d 319, 322 (Md. 1983) (“We recognize that in cases regarding prior misconduct, the cross-examiner is bound by the witness’ answer and, upon the witness’ denial, may not introduce extrinsic evidence to contradict the witness or prove the discrediting act.”); *Boggs*, 588 N.E.2d at 816–17 (concluding that prior false claims without accompanying sexual conduct fall outside the state’s rape-shield statute and are governed by the state’s Rule 608(B), which prohibits the use of extrinsic evidence, and holding that “the defendant will be bound by the answers given by the victim” and “under no circumstances would the defense be permitted to introduce extrinsic evidence”).

100. See, e.g., Fed. R. Evid. 608(b).

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness . . . .

*Id.*; see also *Quinn*, 234 F.3d at 845; *Clinebell*, 368 S.E.2d at 265 (“Generally . . . a witness’ character may not be impeached by showing specific acts of untruthfulness or bad conduct.”).

101. See *Quinn*, 234 F.3d at 845 (discussing credibility, but noting that “no such limit [against the use of extrinsic evidence] applies to credibility attacks based upon motive or bias.”); *State v. Barber*, 766 P.2d 1288, 1290 (Kan. Ct. App. 1989) (upholding the trial court’s explicit negative finding that they had made no false accusation, but stating nevertheless that “[w]e hold that despite the restriction [against extrinsic evidence], in a sex crime case, the victim/complaining witness may be cross-examined about prior false accusations, and if she denies making those accusations, defendant may put on evidence of those accusations”); *State v. Long*, 140 S.W.3d 27, 32 (Mo. 2004) (“The facts of this case indicate that Long is entitled to an opportunity to establish the admissibility of extrinsic evidence regarding the victim’s prior false allegations.”); *Clinebell*, 368 S.E.2d at 266 (“[I]n a sex crime case, the complaining witness may be cross-examined about prior false accusations, and if the witness denies making the statement, the defense may submit proof of such charges.”). Because the evidence is being tendered on behalf of a criminal defendant, constitutional law may require its receipt. See Fed. R. Evid. 412(b)(1)(C) (establishing as an exception to the general rule of inadmissibility “evidence the exclusion of which would violate the constitutional rights of the defendant”); *Olden v. Kentucky*, 488 U.S. 227 (1988) (permitting a criminal defendant to inquire into the victim’s alleged cohabitation with another man on the issue of bias).

102. See Fed. R. Evid. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness’ character for truthfulness or untruthfulness . . .”).

103. See *supra* notes 96–97.



Even if the evidence is admissible, the question is whether the defense attorney should offer it. Several ethical problems—different from the ones in Scenario 1—now present themselves in this scenario. Undeniably, the defendant in Scenario 2 is entitled to professional representation from his attorney. At the least, this standard requires the attorney to provide effective representation to facilitate a fair trial,<sup>104</sup> which the Constitution guarantees to every criminal defendant.<sup>105</sup> However, the guarantee of effective assistance of counsel is not an absolute guarantee of zealous representation.

At this point, to identify that to which the criminal defendant is entitled, we briefly examine the respective roles of the client and the attorney. Defendants determine, among other things, the objectives of the representation they obtain,<sup>106</sup> such as whether to plead guilty or go to trial, and whether to take the stand or remain silent.<sup>107</sup> Defendants are not entitled to direct all facets of their defense, and in fact are not even entitled to consultation about many tactical decisions that must be made by counsel during trials.<sup>108</sup>

Attorneys generally elect how to accomplish the objectives. Thus, they decide many tactical matters during litigation.<sup>109</sup> While the rules of ethics may not provide a definitive answer to who elects to call particular

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104. See, e.g., *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (“The Sixth Amendment guarantees criminal defendants the effective assistance of counsel.”); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing a two-part test for assessing ineffective assistance of counsel claims); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (observing that “the right to counsel is the right to the effective assistance of counsel”). Civil litigants may not have the same constitutionally established rights of a criminal defendant, but they should be able to expect effective representation arising from the contractual relationship with counsel.

105. See *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (noting a criminal defendant’s “‘fair trial’ guarantee”); *United States v. Bordeaux*, 400 F.3d 548, 558 (8th Cir. 2005) (“The Constitution guarantees every criminal defendant a fair trial.”).

106. See Model Rules of Prof’l Conduct R. 1.2(a) (2002) (stating that, with few exceptions, “a lawyer shall abide by a client’s decisions concerning the objectives of representation”); Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 Wake Forest L. Rev. 55, 62 (2003) (identifying fundamental choices left to the defendant).

107. See Model Rules of Prof’l Conduct R. 1.2(a) (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”). For an interesting and thorough discussion of the legal and ethical dilemmas facing counsel for a client who wishes to testify falsely, see Perrin, *supra* note 6.

108. See Colquitt, *supra* note 106, at 55 (discussing the roles of counsel and defendants). Of course, the standards of effective representation are relative, and are determined by the facts of each case. Therefore, an attorney’s failure to consult with the client in some instances may constitute ineffective assistance.

109. See Model Rules of Prof’l Conduct R. 1.3 cmt. (“A lawyer is not bound . . . to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.”).

witnesses,<sup>110</sup> under the traditional view of the attorney-client division of authority,<sup>111</sup> it is the attorney, not the defendant, who will make the choice.<sup>112</sup> Thus, attorneys commonly choose whether to call witnesses, cross-examine opposing witnesses, file motions, or ask for continuances.<sup>113</sup>

Although attorneys are expected to consult with clients about the methods of representation,<sup>114</sup> during a trial an attorney has little time to discuss tactics and litigation choices with her client.<sup>115</sup> Even if the opportunity arises, the client may not be able to choose objectively and wisely. Furthermore, if the defendant makes the decision and it proves to be faulty, the attorney may be blamed on appeal.<sup>116</sup> Therefore, it is more likely that the attorney would make the decision and the defendant would be bound by the attorney's choice.<sup>117</sup> Either way, though—discussion or no discussion—the outcome is potentially the same.

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110. See Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. Cin. L. Rev. 763, 772 (2000) (noting that neither the Model Code nor the Model Rules "resolve[s] conclusively the specific question of who ultimately controls the decision to call particular witnesses").

111. See *id.* at 766–67 (explaining the "traditional approach").

112. See *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003) (noting that "counsel has wide latitude in deciding how best to represent a client"); *Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (observing that with few exceptions "the lawyer has—and must have—full authority to manage the conduct of the trial"); *Scott v. State*, 742 So. 2d 1190, 1196 (Miss. Ct. App. 1999) (noting that whether or not to call witnesses is "within the ambit of trial strategy"); Colquitt, *supra* note 106, at 62–63 (discussing tactical choices left with attorneys); Uphoff, *supra* note 110, at 776 ("The selection of a witness is a strategic or tactical decision that is only a means to the desired end: winning the lawsuit. Accordingly, such a decision is squarely within the lawyer's province."). Professor Rodney Uphoff has noted that "Supreme Court cases demonstrate . . . that the Constitution provides criminal defense lawyers wide discretion over decisionmaking issues . . ." *Id.* at 780. Uphoff has also discussed the control factor at length. In his article, he presented a scenario involving an attorney-client control issue, but his scenario is virtually the reverse of Scenario 2 in this essay. *Id.* at 763–64, 808. In his case, the client wanted to keep his father off the stand and the attorney felt that the father's testimony was important to the defense. In Scenario 2, the opposite is possible: the client may well want the witness to testify, and the attorney may be willing to accept the stipulation in lieu of calling the witness.

113. See Colquitt, *supra* note 106, at 62–63.

114. See Model Rules of Prof'l Conduct R. 1.4(a)(2) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished . . ."); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (cataloging as a "basic dut[y]" counsel's obligation "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution").

115. See *Taylor*, 484 U.S. at 418 ("The adversary process could not function effectively if every tactical decision required client approval.").

116. Such reasons lead to a version of hybrid representation and perhaps some confusion about who is in charge. This is but one of the reasons why hybrid representation is an option that should be used sparingly. See Colquitt, *supra* note 106, at 127. Although hybrid representation might be more readily available in extraordinary cases, this likely is not one of them.

117. See, e.g., *Taylor*, 484 U.S. at 418 ("Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand . . .").

Although the professional rules may permit a defense attorney to make the choice, a question that remains is whether an attorney who accepts the stipulation violates the duty imposed by constitutional law to provide effective assistance of counsel to the criminal defendant.<sup>118</sup> In *Strickland v. Washington*,<sup>119</sup> the Court established a two-pronged test with which courts determine whether an attorney has provided effective assistance. First, the defendant must show that the attorney's performance did not meet an objective standard of reasonableness.<sup>120</sup> Second, the defendant must prove that the attorney's ineffective performance prejudiced the defendant.<sup>121</sup> Failure by the defendant to meet either requirement negates any duty to examine the other requirement.<sup>122</sup> In the instant context, in order to establish that the defense attorney provided ineffective assistance of counsel by accepting or rejecting the stipulation, the defendant would have to show that the attorney did not exercise the reasonable professional judgment expected of competent counsel. Even assuming the defendant can meet the burden, the test is onerous, and—regardless of the choice made by counsel—the defendant likely would be unable to convince a court that counsel's performance so prejudiced the defendant that the result was unfair and unjust.<sup>123</sup> Thus, by accepting the stipulation, the attorney does not violate the *Strickland* standard. Therefore, the defense attorney alone will very likely decide between accepting or rejecting the stipulation free from the bias of the defendant and will be faced with the same dilemma as the prosecutor in Scenario 1.

The choices facing the attorney can be analyzed under several paradigms. Traditionally, such analysis gravitated toward one of two schools of thought: zealous advocacy or personal conscience.

One view of a litigating attorney's obligation to the client is that the attorney must do everything legally permissible to further the client's interests or goals.<sup>124</sup> Under this view, a litigator cannot represent the client

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118. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (stating that “defendants facing felony charges are entitled to the effective assistance of competent counsel”); see also *Strickland*, 466 U.S. at 692 (holding that to render ineffective assistance of counsel, the attorney's performance must fall outside accepted norms and result in prejudice to the defendant); cf. *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (“In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution.”). Nor does it mean that the Constitution permits the practice.

119. 466 U.S. 668 (1984).

120. *Id.* at 688.

121. *Id.* at 692.

122. See *id.*

123. See *id.* at 693–95 (demonstrating that prejudice will not be presumed).

124. See Model Rules of Prof'l Conduct R. 1.3 cmt. (2002) (“A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”); Shargel, *supra* note 80, at 1294 (“It is appalling to render anything less than zealous advocacy to a client, particularly a client facing potential loss of liberty or life.”).

halfway; the attorney must be totally committed.<sup>125</sup> Versions of this paradigm are described alternatively as “zealous advocacy,”<sup>126</sup> the “principle of partisanship,”<sup>127</sup> or the “standard conception.”<sup>128</sup>

Many attorneys and writers view zeal as *the* ethical standard,<sup>129</sup> although not all attorneys and writers are consumed by the zeal conflagration.<sup>130</sup> Nevertheless, the zeal standard certainly has garnered and held the spotlight for a long time. A wealth of scholarly discussion exists beginning with the early observations of Lord Henry Brougham (whose words seemingly continue to surface in any thoughtful discussion of an attorney’s duties to a client)<sup>131</sup> and continuing to a number of writings just this year addressing zealous representation.<sup>132</sup> Lord Brougham opined,

125. The view reminds one of the old adage “In for a penny, in for a pound.”

126. See, e.g., Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *Fordham L. Rev.* 327, 328 (1998) (noting that, “at least in certain contexts, the principle of zealous advocacy requires lawyers to withhold information that may be harmful to the client’s cause”).

127. See, e.g., Rakesh K. Anand, *Toward an Interpretive Theory of Legal Ethics*, 58 *Rutgers L. Rev.* 653, 665 (2006) (noting that the principle of partisanship “requires a lawyer to act with ‘extreme partisan zeal’ on behalf of the client and his/her interests”); Lee E. Teitelbaum, *Ethics, Morality, and Truth-Telling*, 2006 *Utah L. Rev.* 157, 158 (describing partisanship as incorporating “nearly unbounded commitment to a client’s interests and nearly absolute sanctity for the attorney-client privilege”).

128. See James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 *Yale L.J.* 1031, 1060–61 (1994) (reviewing Anthony T. Kronman, *The Lost Lawyer* (1993)).

129. See, e.g., Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 *Tul. L. Rev.* 1377, 1381 (2007) (“Today, lawyers often view the duty to represent the client zealously as the paramount objective of the legal profession.”).

130. See, e.g., *id.* at 1381–82 (“Focusing on the duty of zealous representation alone creates a lawyer who is little more than a ‘hired gun’ and one who does not exercise independent judgment on tactics or goals. The client becomes responsible for the ethical standards to which attorneys adhere. . . . The professional lawyer has competing obligations that must be considered.”). See generally Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 *Geo. Wash. L. Rev.* 1 (2005) (noting the existence of two predominant views of the advocate’s role—zeal and personal conscience—and suggesting a third—professional conscience).

131. See, e.g., Monroe H. Freedman, *Lawyer’s Ethics in an Adversary System* 9 (1975) [hereinafter *Freedman, Lawyer’s Ethics*]; Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 *Geo. J. Legal Ethics* 1213, 1215 (2006); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 *U. Pa. L. Rev.* 1031, 1036 (1975); William C. Heffernan, *The Moral Accountability of Advocates*, 61 *Notre Dame L. Rev.* 36, 76 n.80 (1986); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 *Iowa L. Rev.* 1091, 1170 (1985); Zacharias & Green, *supra* note 130, at 2 & n.2. Some, though, for the sake of brevity, quote only the first sentence. See, e.g., Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 *Emory L.J.* 271, 280 n.18 (1984); Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 *Fordham L. Rev.* 1339, 1350 (2006).

132. See, e.g., Camp, *supra* note 129; Mae C. Quinn, *An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 *B.C. L. Rev.* 539, 539 (2007) (rejecting Therapeutic Jurisprudence principles and the “‘rehabilitative’ defense lawyer” in favor of retaining the zealous representation model). See generally David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 *B.C. L. Rev.* 597 (2007)

An 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 must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.<sup>133</sup>

Under the zealous representation model, therefore, the attorney's choice in Scenario 2 is quite clear. It is likely in the client's favor to prejudice the jury in a manner favorable to the client's case, and as such the stipulation must be rejected.<sup>134</sup> Zealous representation assumes that a neutral third party (i.e., the judge) is maintaining a watchful eye over the proceedings. Therefore, under this view, the attorney need not concern herself with the potential prejudice to the third parties,<sup>135</sup> and must look to gain all favorable ground over the opponent.

The zealous representation model, though, potentially legitimates practices by counsel that, although not illegal, are inappropriate or at least undesirable.<sup>136</sup> Consider a nonevidence example. The detrimental impact of emphasizing zealous representation can be seen in the jury selection process, particularly as it existed prior to 1986 (and, perhaps, continues to exist today).

Prior to 1986, the peremptory challenge process empowered trial counsel to remove prospective jurors for "good reason, bad reason, or no reason at all."<sup>137</sup> Attorneys exercised virtually unlimited and unscrutinized discretion during the peremptory challenge stage of jury selection. A trial attorney in a civil or a criminal case, answerable to no one, could have stricken venire

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(answering Professor Quinn and promoting the incorporation of therapeutic lawyering as an "add-on" to other models such as zealous representation).

133. Freedman, *Lawyer's Ethics*, *supra* note 131, at 9.

134. *See, e.g.*, Orenstein, *supra* note 8, at 1603 ("Yet we cannot very well insist that defense attorneys take it easy on rape victims—that would subvert the attorney's duty to zealously represent their clients."); Shargel, *supra* note 80, at 1294 ("Zealous advocacy means arming the client with every legitimate means of defense."). As a longtime participant in trials, though I do note that sometimes the injection of prejudicial information against one party can have an unexpected and undesired effect, namely that the fact-finder may riposte against the party presenting the prejudicial information because the party is viewed as behaving inappropriately.

135. *But cf.* Model Rules of Prof'l Conduct R. 4.4[1] cmt. 1 (2002) ("Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons.").

136. *See, e.g.*, Orenstein, *supra* note 8, at 1603 ("[A]lthough cheap shots against the [rape] victim are unfair, unkind, and arguably bad for society, such behavior is to be expected of defense attorneys for whom the freedom and reputation of their clients is at stake.").

137. *Ex parte Bruner*, 681 So. 2d 173, 182 (Ala. 1996) (Maddox, J., concurring) (noting that, prior to *Batson*, "a party could exercise a peremptory challenge for a good reason, a bad reason, or for no reason at all"); *Wright v. Bernstein*, 129 A.2d 19, 24 (N.J. 1957) ("Thus a peremptory challenge can rest on a good reason, a bad reason, or no reason at all.").

members based on information, lack of information, hunches, stereotyping, race, or gender.<sup>138</sup>

The peremptory scheme allowed zealous counsel to violate the as yet unannounced constitutional rights of prospective jurors<sup>139</sup> and to project to the community the image of a discriminatory court system. As a result, the Supreme Court addressed the discriminatory practices in a series of cases beginning with *Batson v. Kentucky*.<sup>140</sup>

In *Batson*, the Court held that criminal prosecutors could not deliberately remove prospective jurors solely on account of their race, thus protecting minorities from the discriminatory practices of prosecutors.<sup>141</sup> *Batson's* progeny expands this protection to women,<sup>142</sup> and curtails like conduct by criminal defense and civil attorneys.<sup>143</sup> In the case of discriminatory peremptory challenges by criminal defense counsel, the Court essentially has given notice that it will not accept the argument that zealous representation requires an attorney to represent the client to the utmost. The Court favors the prevention of discriminatory practices in jury selection over the fair trial arguments of criminal litigants.<sup>144</sup> *Batson* and its progeny

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138. See *Bruner*, 681 So. 2d at 182 (Maddox, J., concurring) (observing that prior to *Batson* and its progeny, attorneys “could strike jurors because of their race, color, religion, sex, national origin, economic status, or eye color”).

139. Although the rule was unannounced as to the exercise of peremptory challenges, counsel were on notice of the possibility that discriminatory peremptory strikes might violate constitutional principles. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding that a state violated the equal protection of minorities if it explicitly barred minorities from serving on juries). Although it took the Court many years to apply the principle to the discriminatory use of a state-provided process in a state court, some might opine that it should have been but a short journey.

140. 476 U.S. 79 (1986).

141. See *id.*

142. See generally *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (extending *Batson* protections to gender discrimination).

143. See generally *Georgia v. McCollum*, 505 U.S. 42 (1992) (applying the *Batson* rule to criminal defense attorneys and defendants); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying the *Batson* rule to civil litigants; a civil litigant violates the Equal Protection Clause by exercising peremptory challenges in a racially discriminatory manner).

144. See *McCollum*, 505 U.S. at 57 (concluding that a criminal defendant's rights to counsel, an impartial jury, and a fair trial do not “include[] the right to discriminate against a group of citizens based upon their race”).

Some scholars, though, argue that subsequent decisions purportedly applying the *Batson* rule actually rob *Batson* and its progeny of much of their legitimate impact. See, e.g., Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 Wis. L. Rev. 501, 501 (opining that the Court has been anxious to render *Batson* as “meaningless, ineffective, and unthreatening as possible,” and concluding that the peremptory challenge is “alive and well for those who know how to use it”); see also Deana Kim El-Mallawany, Comment, *Johnson v. California and the Initial Assessment of Batson Claims*, 74 Fordham L. Rev. 3333, 3359 (2006) (discussing recent *Batson*-challenge cases and describing the *Batson* framework as “ailing”). Critics argue, for example, that despite the rulings of the Supreme Court, attorneys may effectively continue to discriminate on the basis of race and gender; they just cannot admit doing so. See, e.g., Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 Rev. Litig. 209, 246 n.164 (2003) (“In fact, one would be hard-pressed to maintain that the explanations offered by the

thus demonstrate a pernicious facet of the zealous advocacy paradigm, namely, the willingness to engage in harmful activities including discriminatory practices for the benefit of the client.

Whereas those in favor of an ethical system based upon zealous advocacy might subordinate the attorney's judgment to the client's wishes,<sup>145</sup> proponents of the personal conscience approach uphold the right of the attorney to utilize her own moral code as a basis from which to decide such dilemmas. This personal conscience depends on ethical considerations formed outside of the judicial system and will be unique to each attorney. Thus, under the personal conscience model the choice of whether to accept or reject the stipulation will likely depend on a number of factors, as viewed subjectively by the attorney: What is the likely utility of a limiting instruction, and how probative is the proffered evidence? Given the makeup of the jury, how prejudicial does the attorney consider the potential testimony to be to the opposing side? Does the attorney believe that the prosecutrix is lying? How strongly does the attorney believe in the guilt or innocence of the defendant?

With either model, the potential situations to be faced by attorneys are too numerous to be accurately forecasted. However, whereas attorneys operating under the zealous advocacy model can be depended on to at least act in a consistent manner, the personal conscience model is undesirable in that it affords no guidance or expected outcome for any potential situation. Instruction under the model itself is inherently vague, in that attorneys are licensed to decide legal questions with a subjective rationale, as evidenced

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prosecution in *Purkett* were anything other than ridiculous, not to mention offensive and insulting."); Cavise, *supra*, at 538 ("The post-*Purkett* neutral explanation has, for the most part, been reduced to what one Illinois court has called a 'charade.'"); Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 Fla. St. U. L. Rev. 857, 886 n.117 (2003) (noting that *Batson* "is frequently circumvented [by practitioners] through pretextual rationales which" may appropriately be labeled "lies"). In *Purkett v. Elem*, the Court concluded that, in applying the *Batson* rule, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." 514 U.S. 765, 768 (1995). And, in *Hernandez v. New York*, the Court defined a sufficient ground to support the removal of a protected-class juror as "an explanation based on something other than the race [or gender] of the juror." 500 U.S. 352, 360 (1991). Thus, race- or gender-neutral reasons for removing protected-class jurors became easier to identify, and the burden to show a violation of the constitutional rights of jurors was placed squarely on the shoulders of the objecting party.

To the critics, *Batson*'s promise has been eviscerated and zealous attorneys will be able to discriminate, albeit surreptitiously, against prospective jurors at will. See, e.g., Cavise, *supra*, at 501 ("Only the most overtly discriminatory or impolitic lawyer can be caught in *Batson*'s toothless bite and, even then, the wound will be only superficial."); see also Lance Koonce, Note, *J.E.B. v. Alabama ex rel. T.B. and the Fate of the Peremptory Challenge*, 73 N.C. L. Rev. 525, 560-61 (1995) (observing that it is "likely that the peremptory will remain in place, damaged but still useful, and courts and litigators will do what they always do when confronted with new restrictions: adapt").

145. They advocate doing so short only, perhaps, of committing a criminal offense (or contempt of court?).

by David Hoffman's declaration that "I am resolved to make my own, and not the conscience of others, my sole guide."<sup>146</sup>

Thus, fault exists within each model, in that legal decisions wherein discretion exists solely with the attorney are either blindly made in favor of the client with little or no regard for potential repercussions, or are made subject to the individual rationales of the attorney and are therefore unpredictable and totally subjective. However, another school of thought has arisen that commonly considers "professional conscience" as the basis for lawyers' ethics. Aligning itself with neither zealous representation nor personal conscience, the professional conscience model maintains that "identifiable standards for professional conduct exist and that these are to be determined by the judicial branch."<sup>147</sup>

Authors such as Professors Fred Zacharias and Bruce Green frequently disagree with the zeal school's emphasis on the attorney's duty to represent his client to the fullest extent allowed by the rules and law.<sup>148</sup> Professional conscience proponents focus instead on axioms that are not codified within the various model codes and rules of conduct, but that exist nonetheless as part of the professional role. This professional conscience is also distinct from the personal conscience, in that the professional conscience is a set of norms that are developed not based upon individual notions of justice, but rather are developed through socialization among lawyers.<sup>149</sup> Therefore, though the rules might permit an attorney discretion in a certain situation, professional conscience may nonetheless restrict the attorney's actions, and a judge may in turn find fault with the actions if they conflict with that conscience.

The professional conscience model does provide three guideposts by which to measure the bounds of the attorney's discretion.<sup>150</sup> First, the attorney is not under an obligation to pursue only those goals that favor the client.<sup>151</sup> The attorney may conduct an assessment of the case of his own accord, and act accordingly to uphold professional standards of the court. Second, the attorney need not subordinate his rights to those of the client, and may instead act to protect his personal interests.<sup>152</sup> Finally, it is the court that will decide the standards by which attorneys must conduct

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146. Resolution XXXIII, *supra* note 1, at 765.

147. Zacharias & Green, *supra* note 130, at 12.

148. *See, e.g., id.* at 37.

149. *Id.* at 32 ("Arguably, therefore, the 'professional conscience' upon which Justice Gibson relied embodies professional norms that derive loosely from the lawyer's professional relationship to the court, which is itself committed to promoting justice. The norms have not necessarily been expressed in the law; they are transmitted through professional socialization. Even in the absence of an explicit judicial ruling—like the one that *Rush* sets forth (i.e., thou shalt not consciously prosecute an innocent man)—lawyers are supposed to know through training and experience what is expected of them professionally and to comport with the professional expectations even in the face of conflicting client demands." (citations omitted)).

150. *See id.* at 16 (identifying considerations that "justify a lawyer's self-restraint[]").

151. *See id.* at 10.

152. *See id.* at 11.



themselves.<sup>153</sup> Therefore, while the attorney need not subordinate his views to those of the client, he will have to justify those views to the court.

The professional conscience may be a source of guidance in situations in which discretion exists on the part of the attorney, as in situations like Scenario 2 where no rule explicitly addresses an action. Hence, its reasoning lends itself to an essay whose focus is the gray areas of the rules of ethics. Nonetheless, Green and Zacharias do not directly address the issues presented by this essay, largely because they focus heavily upon the source and impact of the professional conscience, while electing not to offer clear standards for what the conscience would permit or proscribe in various situations because they believe rules cannot always provide satisfactory answers.<sup>154</sup> At most, they may tell us that some actions by the attorney in Scenario 2 might be incongruent with the professional conscience, but they do not give us a definitive answer. As such, though the professional conscience school might give depth to the attorney's reasoning in such a scenario, it cannot offer him specific guidance.

In sum, despite the existence of various views on the role of the attorney and client, none of them provide a broadly applicable, suitable guide for counsel in many situations, including those presented in either of our scenarios.

### III. A FEW OBSERVATIONS AND SUGGESTIONS

Our citizenry depends in significant part on our justice system, and its judges and attorneys, to protect society. As emphasized by Kenneth M. Rosen, because the legal profession is a public profession, in the presence of competing ethical values, the American lawyer retains an overriding duty to uphold democracy as a public servant.<sup>155</sup> While the system likely will survive for years to come, unless it retains significant public confidence and support, it may morph into something as yet undetermined.

Obviously, it is virtually inconceivable that we could identify and catalog all of the possible scenarios that will face attorneys as they litigate cases. Litigation routinely creates situations that require counsel to make difficult choices. No list of possibilities or set of rules would ever be really complete or particularly helpful.<sup>156</sup> The infinite variety of potential issues and their facets make general standards meaningless "boilerplate" and detailed provisions likely impossible. Trials frequently are fast-moving

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153. *See id.* at 12.

154. *See id.* at 54 ("Although the decision should be made by reference to professional interests, the preferable approach in any given case requires weighing various relevant facts in light of the competing interests. The best that a rule can do is to tell lawyers that there is no one correct answer for all cases within the broad category and then leave it to individual lawyers, at least in the first instance, to try to get it right in individual cases.")

155. *See* Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 *Geo. J. Legal Ethics* 155, 163 (2006).

156. *See* Orenstein, *supra* note 8, at 1607 ("Both the Rules of Evidence and the Rules of Professional Conduct are particularly unhelpful in assisting attorneys to confront these problems.")

events, and both prosecuting and defense attorneys need guidance<sup>157</sup> on the one hand and discretion on the other<sup>158</sup> in order to fulfill their roles.

Thus, it seems that we should provide counsel with some standards or rules (as we do), but that we also should school counsel that as attorneys they will be called upon to exercise professional judgment, and in doing so, they may have to rely on their professional conscience to identify the appropriate course of action. Even then, their selection of a course may be overruled by a judge or debated by others. The choice may never be clear.

In our scenarios, counsel are in a position to proffer highly prejudicial evidence where justice does not require that they do so. Accepting the stipulation arguably would adequately serve the needs of the prosecution in the first scenario and the client in the second. Thus, if the respective attorney can accept the stipulation and advance the party's cause, counsel can provide the kind of advocacy she feels duty-bound to provide, and at the same time prevent harm and injustice to others.

Nevertheless, as postulated in this essay and as likely in real settings, both the prosecutor in Scenario 1 and the defense attorney in Scenario 2 will reject the proffered stipulations. The prosecutor will proceed to offer evidence of the defendant's adultery on the issue of motive even though the stipulation would supply evidence of motive and though professional conscience might suggest that she should accept the stipulation, particularly in light of the injection of race into the case. In Scenario 2, the defense attorney will also proceed to offer evidence of the prosecutrix's prior false claim, although the admission and proffered stipulation would supply evidence of motive and discredit the prosecutrix's present testimony.<sup>159</sup> Once again, that course of action would eliminate the issue of race, and yet present the evidence that reinforces the defendant's claim that the prosecutrix's claim of rape is false.

In sum, neither of the two most conceivable courses of action is optimal, but the most likely choice in each scenario (namely, rejection of the proffered stipulation) may be the least suitable of all options.

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157. *See, e.g.*, Standards for Criminal Justice: Prosecution Function & Defense Function Standard 3-1.1 (3d ed. 1993) ("These standards are intended to be used as a guide to professional conduct and performance.").

158. *See, e.g., id.* Standard 3-1.2(b) ("The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.").

159. *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 186 (1997) ("Although Old Chief's formal offer to stipulate was, strictly, to enter a formal agreement with the Government to be given to the jury, even without the Government's acceptance his proposal amounted to an offer to admit that the prior-conviction element was satisfied, and a defendant's admission is, of course, good evidence.").

## CONCLUSION

Rarely can we identify and govern through rules or canons all of the considerations that may come into play.<sup>160</sup> Circumstances are infinite, and many possibilities will remain unforeseeable until revealed in the course of litigation. It is beyond our ability to adequately identify and address beforehand the vast variety of circumstances that an attorney may confront during litigation. Perhaps the best that we can expect is to identify and address factors that attorneys should weigh when faced with an evidence issue compounded by ethical considerations. If we identify and address the principles, we can catalog the factors attorneys should consider when exercising their professional judgment and discretion. With that information, and with due regard to the potential consequences of their choices, attorneys can exercise their discretion in a more informed manner.<sup>161</sup>

In sum, we need to focus on what we are doing and how we are doing it.<sup>162</sup> Litigating attorneys must ask themselves whether their choices are legally and ethically correct, necessary, appropriate, and fair. If not, they should rethink their strategy or method. Remember, “What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom.”<sup>163</sup>

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160. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984) (addressing effectiveness of counsel and stating that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. . . . Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause”).

161. William Simon, though, has opined that we already provide such guidance. See William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1131 (1988) (contending that informal professional responsibility norms do provide sufficient guidance to lawyers faced with ethical problems as they try to “think through the issues,” but lack “specific instructions designed to make it unnecessary to think through the issues”).

162. See Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 Tul. L. Rev. 695, 776 (2001) (making the same observation in another context).

163. Resolution XXXIII, *supra* note 1, at 765.

*Notes & Observations*