THE ETHICS OF EVIDENCE
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25 Am. J. Trial Advocacy 487 (2002)
[footnotes omitted and text editted]

I. INTRODUCTION

In my first trial as a 26-year-old Assistant District Attorney in Manhattan, I prosecuted a nefarious criminal charged with commercial burglary -- breaking into a warehouse at night. It is rare that anyone is caught for such a crime, but in this case, a passing police officer happened to see the perpetrator climbing out of a broken store front window with two fur coats in his hands while the burglar alarm blared. Commercial burglary is not a serious crime in New York, so the defendant had been out on bail for two years when the case went to trial. However, despite the passage of time and the defense attorney's best efforts to make this hoodlum presentable, my witnesses calmly and confidently identified the young man sitting next to his attorney as the "perp."

All was going well, until the close of the People's case. The defense attorney stood up and moved for a directed verdict on the ground that no witness had identified the defendant as the burglar. I was confused. Hadn't two witnesses identified him from the stand? The defense attorney smiled. My witnesses had identified a fellow public defender from the Legal Aid office who was the person sitting at counsel table. The actual defendant was sitting in the middle of the audience. I'd been duped! The judge looked at me and offered some kindly advice that I dismiss the case, because even if he denied the motion, the jury would never convict after the misidentification.

A few years later, as I began to teach and write about evidence and trial practice, I realized that the defense attorney had deliberately created false evidence. He had not suborned perjury, of course. Suborning perjury was wrong. He had merely set the stage for inevitable false testimony because he knew that my witnesses would assume that whoever was sitting at counsel table was the defendant, and would therefore identify the wrong man. His conduct had caused a miscarriage of justice, allowing a criminal who had been caught red-handed to go free to prey again upon the unsuspecting warehouses of New York. Surely this passive involvement in creating false evidence was just as unethical as active subornation of perjury. I started including a hypothetical in my classes based on this experience.

Recently, there has been substantial publicity about DNA tests showing that lots of people who were convicted for crimes were actually innocent, despite the fact that they had been confidently identified by eyewitnesses. This has caused me to revisit that small New York courtroom 25 years ago and wonder about my own role. In trial after trial as an Assistant District Attorney, I asked countless witnesses to "look around the courtroom" and see if they could identify the person who attacked, robbed, raped or sold drugs to them. However much defense attorneys tried to alter their clients' appearances, my witnesses unhesitatingly pointed them out. Was it because they really remembered the faces of the perpetrators, or were they just pointing out whoever was

sitting at counsel table? I, too, had undoubtedly participated in the creation of false evidence, although it was so commonplace that I never thought about it at the time. Could such routine courtroom testimony actually be unethical?

Although the presentation of false, misleading or unreliable evidence would seem to be a core concern of those who worry about our litigation system, the ethics of evidence has been written about infrequently. In the small body of literature that does exist, the focus tends to be limited to the relatively easy problem of whether the Model Rules of Professional Conduct (or their predecessor, the Model Code of Professional Responsibility) prohibit an attorney from creating or using perjured and other kinds of false evidence. The ethics of dubious evidence is rarely addressed. By treating ethics as an issue only of what the rules say about the knowing use of false evidence, the literature ignores the more complex and common ethical issues concerning the use of evidence that is misleading, incomplete, or unreliable. This Article will attempt to fill some of that gap.

II. ETHICS AS PRINCIPLES RATHER THAN RULES

Most writings on the ethics of evidence approach the issue as an analysis of rules. They parse the text of the Model Rules, engage in statutory interpretation, and pose questions of ethics solely in terms of whether an attorney is likely to be successfully disciplined. Given the relative failure of the bar to police itself and the extreme unlikeliness that an attorney will be disciplined, this seems a poor way of approaching an issue of ethics.

Ethics are not rules, of course. They are moral principles that guide our lives as attorneys. The decisions we have to make in litigation are too variable and complex to be reduced to rules. The Model Rules may be the "law for lawyers," clearly defining the circumstances under which we can be found guilty of improper conduct and disbarred, but they are not coextensive with the concept of legal ethics. If we are to live lives as ethical litigators, we must make decisions concerning evidence based on more than the Model Rules -- we must (and do) rely on our experience, judgment, tradition, moral ideals, and character guided by moral principles that are supposed to push us in the direction of good lawyering.

The problem with thinking of ethics as rules arises most clearly when the Model Rules do not explicitly prohibit a proposed course of questionable conduct. In one memorable case in my early years, I prosecuted a 50-year-old prostitute for robbery after she hit one of her johns over the head with a lamp and stole his wallet. Before trial, the defense attorney had gotten her a part-time job at the New York Public Library as part of a drug-rehabilitation program. At trial, she showed up wearing a brown tweed suit, with her graying hair in a bun, took the stand and testified that she was a librarian. The jury looked at me like I was insane for accusing this nice old lady of being a prostitute. There is no ethical rule governing misleading clothing, nor getting a client a last-minute job, nor telling them to wash the dye out of their hair and look their age.

In the absence of broader ethical principles, lawyers are drawn to the position that anything that might increase their chances of winning that is not expressly prohibited, is permitted -- even

required.

Conceptualizing the ethics of evidence as merely an exercise in the interpretation of rules also stifles discussion of the hard questions. False evidence is an easy issue. Questions about the propriety of misleading, incomplete and unreliable evidence are harder. If we limit ourselves to rule-thinking, we may end up saying vaguely that "[t]here is no Model Rules provision that expressly proscribes trickery" [William H. Fortune et al., Modern Litigation and Professional Responsibility Handbook 393-94 (1996)], other than the rule against knowing use of false evidence and proceeding no further. We can do a better job of thinking about the ethics of evidence.

III. THE FOCUS ON FALSE EVIDENCE IS TOO LIMITED

Because commentators approach the ethics of evidence as a question of rules, they usually frame the discussion in terms of its one clear rule: an attorney may not create, use or rely on evidence the attorney knows to be false. The Model Rules explicitly prohibit knowingly using false evidence. Rule 3.3 states that "A lawyer shall not knowingly [m]ake a false statement of material fact or law to a tribunal [or o]ffer evidence that the lawyer knows to be false." What is there to talk about -- exceptions to the rule? That is indeed the unlikely direction in which the literature runs. Are exceptions that permit a lawyer to use false evidence ethically?

Mostly, the literature is full of epistemological essays on when a lawyer "knows" that evidence is false. Is a little knowledge enough, or must the lawyer know falsity beyond a reasonable doubt? Can lawyers, like ostriches, hide their heads in the sand to avoid knowing something? To the extent that the literature touches on evidence that is not false, but merely misleading or unreliable, it simply points out that such evidence is not known to be false, so using it will not violate Rule 3.3. Lawyers are free to subvert justice to their hearts' content as long as they can tell the disciplinary commission with a straight face that they did not actually "know" the evidence was false. So far so good, if somewhat banal.

But now a problem arises. The false-evidence rule addresses when a lawyer cannot use evidence, or when the lawyer might be sanctioned, but does not give any positive guidance for the ethical use of evidence. The false-evidence rule literature assumes a dichotomous ethical universe in which whatever is not expressly prohibited must be permitted. Obviously, no rule says this, and it is a somewhat uncomfortable result to reach. Therefore, the discussions generally articulate an implicit rule requiring all non-false evidence to be presented, which they derive from the principle of zealous representation.

At times the discussion takes on a distinctly Orwellian tone, in which "knowing" and "false evidence" are given so narrow a meaning that nothing is known to be false, and zealous advocacy is given so broad a meaning that everything dishonest and deceitful is made mandatory. For example, one author posed the question, "What does an attorney really 'know'" about her client's intent to give false testimony, and then answered it as follows:

"[T]he question is a hard one, and requires that the attorney use "extreme caution" in answering. The reason is that suspicion of fraud is usually raised by the receipt of conflicting information, either from the client or in tandem from another party. This conflict alone does not appear to constitute "knowing," because "mere suspicion" is not enough to establish a possible client fraud; nor is "a mere inconsistency in the client's story sufficient in and of itself to support the conclusion" that he will commit a fraud on the tribunal. So what constitutes "knowing"? Although one court stated that an attorney should know, based upon her professional experience, if the client's representations are false, not all courts have not taken such a liberal view. For example, in United States v. Long, the Court of Appeals for the Eighth Circuit said only "a clear expression of intent," evidenced by "a client's announced plans" to commit fraud will constitute the level of knowledge required before an attorney may reveal a client confidence. The Second Circuit went even further in Doe v. Federal Grievance Committee ... [and] insisted upon a "clearly established" or "actual knowledge" standard, which is met "when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal." .... Indeed, an attorney who, relying on suspicions or inconsistencies, prematurely jumps to the conclusion that her client is going to commit a fraud and discloses such to the tribunal may be liable for breaching her ethical duty to maintain her client's confidences and secrets.... When an attorney unnecessarily discloses the confidences of her client, she creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation..... [A]sking the attorney to assemble and weigh the facts so that she may "know" if her client is committing a fraud is asking her to play judge and jury, a role that clearly does not belong to her. If the attorney does not "know for sure" that the evidence is false, she should present it; and, as long as the client does not admit that his story is false, even though "one knows in [one's] heart of hearts" that it is false. [Horgan, 29 New Eng. Law Rev. 795 (1995)"

To the extent that the literature has addressed a lawyer's affirmative obligations, it has generally assumed that there is no ethical principle relating specifically to evidence. The authors then fall back on the lawyer's general duties of client loyalty and zealous representation within the bounds of law. The problem is that neither of these principles says anything about using misleading, unreliable or incomplete evidence. Arguments that a lawyer is required to mislead a jury out of loyalty to a client, or that deliberate evidentiary deception constitutes zealous advocacy within the bounds of law, are unpersuasive. One should be able to be loyal to a client, a zealous advocate, and an ethical attorney without defrauding the jury. Is there really no ethical principle guiding a lawyer's decisions to use evidence?

A fair reading of the Model Rules cannot possibly produce the conclusion that the overriding ethical principle of litigation is "anything goes." A lawyer is not given carte blanche to ask trick questions, present unreliable or misleading evidence, and make any argument however deceitful, in the name of client loyalty and zealous advocacy. As one court stated, just before suspending an attorney: "Attorneys must 'possess a certain set of traits--honesty and truthfulness, trustworthiness and reliability, and a professional commitment to the judicial process and the administration of justice.'"

The Model Rules themselves place clear limits on this principle. They do not demand unrestrained zealous advocacy designed to win at all costs, but zealous advocacy within the bounds of law. Within even that more limited duty, there are perfectly clear ethical limits set by Rule 8.4 (c): "It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

This duty is further constrained by Model Rule 3.3(c), which says a lawyer should "refuse to offer evidence that the lawyer reasonably believes is false." Ethical Considerations promulgated under the superseded Model Code of Professional Conduct reminded lawyers they were supposed to avoid bringing about unjust results or inflicting needless harm on others. Lawyers owe a duty to the system of justice to utilize procedures that command public confidence and respect. Model Rule 3.4 (e) provides: "A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."

Taken together, these statements reflect an ethic quite different from the amoral proposition that an advocate's primary duty is to win the case for the client, constrained only by the prohibition against using knowingly false evidence. They direct an advocate to act in good faith, to abide by rules of evidence and procedure, to avoid conduct that will deceive a jury, and to limit the use of evidence to that which the advocate reasonably believes is accurate. A lawyer is not obliged or even permitted to mislead the jury with unreliable and incomplete evidence, but must have a good faith basis for that evidence before presenting it in the first place.

IV. THE GOOD-FAITH PRINCIPLE

The good-faith principle goes beyond prohibiting the use of false evidence, and guides an advocate's conduct with respect to dubious evidence which the lawyer does not know for certain is false. The lawyer may only use or refer to evidence if the lawyer has a good-faith basis to believe that it represents the best recollection of a witness, and can be presented in accordance with the rules of evidence and procedure. This is a two-part standard under which an advocate must have both a factual and a legal basis for alluding to, asking about, offering, or relying on particular evidence. To have a good-faith factual basis, the attorney must have both a subjective belief that evidence represents the true recollection of a witness, and objective support for that belief, such as a deposition, statement, report, or interview notes. To have a legal basis, the attorney must have a reasonable legal argument that it is admissible under the rules of evidence and procedure.

A. FACTUAL BASIS

An attorney must have a factual basis for alluding to, offering, or relying on evidence at trial. That factual basis may not be wishful thinking. There are two requirements for a factual basis -- an attorney's subjective belief, and objective evidence to support that belief. The attorney's investigation and discovery must show a likelihood that a witness exists who believes that evidence to be true, could be called to testify to it, and would in fact testify to it. Under this principle, an ethical advocate will not mention dubious evidence in opening statement, will not

attempt to present evidence believed to be inaccurate, will not ask a leading question that includes an unsupported factual suggestion, and will not incorporate into closing argument "surprise" misstatements and overstatements by witnesses that make the case seem more favorable than it is. By requiring both a subjective and objective factual basis, we avoid the superficial argument that because lawyers can never really "know" whether evidence is true or false, there are no ethical impediments to introducing dubious evidence regardless of objective indications of its unreliability.

First, an attorney must have a subjective belief that proposed evidence reflects the genuine recollection of a witness and is not a fabrication. This is not the same thing as whether the attorney personally believes the evidence is true. I once defended a man who was caught shoplifting food who claimed to be a field operative for the C.I.A. on a training mission to see if he could survive in a strange city for a month with no money and no identification. He wanted me to inform the judge that a conviction would jeopardize his security clearance. He stuck to this story despite my skepticism. I called the CIA to explain the situation and ask if they could verify his claim, but of course they denied any knowledge of this guy. Did I personally believe his story? No. Did I believe that my client genuinely thought he was in the CIA? Yes, although I also thought he was crazy.

Second, an attorney must have an objective basis for his or her decision to allude to evidence in opening statement or attempt to elicit it from a witness. Wishful thinking, intuition and impressions based on demeanor are not adequate to justify using or alluding to evidence. The attorney must be able to point to documents, statements, records, or depositions that indicate that an identifiable witness exists who has stated in the past that a particular fact is true, could be called to testify, and has been reasonably consistent in his or her assertions. Unrecorded statements from your client made during interviews satisfy the objective basis test, even though they may be unrecorded and confidential. The requirement of an objective basis is not for the purposes of proving to a court or disciplinary committee that one was acting in good faith, but is required for an advocate's own ethical judgment. Thus, confidential information gained from the client or through the attorney's work-product can supply that objective basis. Once a witness has in fact testified to something, the trial testimony itself supplies the objective, although not the subjective, basis for relying on the evidence in closing argument.

Third, the attorney must have a basis for believing the witness will actually show up in court and testify to their recollections. It is not enough that your client assures you his friends will show up, or that your opponent has put someone's name on their witness list. The attorney must satisfy him- or herself that the witness will actually testify. Serving a subpoena on a witness or obtaining the witness's firm promise to attend is usually adequate, although there may be circumstances where mere service of a subpoena is not enough. In the movie "Suspect," the defense attorney has a private investigator track down a homeless man with no fixed address whom she believes can supply her client with an alibi. The witness stabs the investigator, throws away the subpoena, and disappears into the night. The judge correctly cautions the attorney not to mention this missing witness to the jury because in all likelihood he will never be found.

B. LEGAL BASIS

The admissibility of evidence is controlled by rules of evidence and procedure. It is therefore obvious that an attorney must also have a legal basis for asking a question or offering evidence. He or she must have a reasonable belief that the evidence is admissible.

A lawyer should not attempt to get before the jury evidence which is improper. In all cases in which a lawyer has any doubt about the propriety of any disclosures to the jury, a request should be made for leave to approach the bench and obtain a ruling out of the jury's hearing, either by propounding the question and obtaining a ruling or by making an offer of proof.

For example, it would violate this principle to ask a witness if he or she has been convicted of drunk driving (even if true) because the rules of evidence limit impeachment to felonies and crimes of dishonesty. It would also violate this principle to ask a question alluding to inadmissible evidence and then "withdraw" it if the other side objects. As one court put it, it is improper for an attorney to ask a question "which he knows and every judge and lawyer knows to be wholly inadmissible and wrong."

This is a principle guiding an attorney's decision to attempt to introduce evidence. The ethics of offering evidence depend on an attorney's legal analysis prior to the offer, not on what happens afterwards. It is unethical to offer evidence believed to be inadmissible on the off chance that your opponent will not object or the judge will rule unexpectedly in your favor. This principle can also work in your favor. It is not unethical to have attempted to introduce evidence you thought was admissible just because an objection was sustained. Lawyers and judges will frequently have legitimate disagreements on the admissibility of evidence.

This part of the good-faith principle similarly should have both a subjective and objective component. The attorney must be able to point to a rule of evidence that plausibly supports the item's admissibility, and also have a subjective belief that the evidence properly be admitted under that rule.

V. ARE THERE DIFFERENT ETHICAL STANDARDS FOR CRIMINAL DEFENSE ATTORNEYS?

A number of commentators suggest that a criminal defense attorney is held to a lower ethical standard than other attorneys. Much of the discussion of whether a lawyer has a duty of zealous loyalty to a client that permits the ethical use of misleading, unreliable or false evidence focuses on the representation of criminal defendants. Prosecutors and civil lawyers are either ignored or distinguished from criminal defense attorneys. For example, Fortune, Underwood and Imwinkelried summarize the conflicting opinions about whether it is unethical for a lawyer to call witnesses for the purpose of creating a false impression as follows: "Perhaps the best that can be said is that a criminal defense lawyer may call the witnesses, a prosecutor may not, and civil lawyers should not." The suggestion of a different standard for criminal defense attorneys is implausible. There is certainly no general ethical principle permitting attorneys to practice

deception, fraud, and trickery in order to further the important social goal of returning violent criminals to the streets regardless of guilt. Nor does a criminal defense exemption exist in the Model Rules. The provisions concerning the duty to investigate, confining one's zealotry to the bounds of law, the prohibition against false evidence, declining representation that would result in a violation of law or other fraud, exercising independent judgment that includes moral factors and acting good faith make no distinction between criminal and civil cases.

Then where does the claim come from? Selinger believes its proponents derive the claim of special rules for criminal defendants from the burden of proof. "The argument would be that [making the prosecution overcome false evidence] is just another legitimate way of putting the prosecution to its proof -- of making sure that the prosecution is not getting into a dangerous-to-the-innocent habit of bringing criminal charges on weak evidence -- which a defense lawyer is clearly permitted to do, under Model Rule 3.1, even on behalf of an admittedly guilty client."

The problem is that false evidence does no such thing. It does not simply put the prosecution to its proof. It is one thing to attack a weak government case by pointing out its weakness. It is another to attack a strong government case by confusing the jury with falsehoods.

The claim of a special rule for criminal lawyers also is sometimes tied to the defendant's constitutional right to the effective assistance of counsel. For example, Horgan argues that criminal defense attorneys are specially exempt from the rule requiring that attorneys disclose fraudulent evidence:

"[T]rust between attorney and client ... is the "cornerstone of the adversary system and effective assistance of counsel." A client... is unlikely to divulge all the information necessary for his defense if he feels that the attorney would violate the attorney-client privilege and pass the information on.... If the client withholds information, the truth cannot be ascertained, nor can the attorney fulfill her duty of candor to the court. This creates a catch-22. A client can fall into one of three categories: (1) one about whom the attorney has no suspicions; (2) one whom the attorney suspects of fraud; or (3) one whom has admitted his fraudulent intent (or it has been conclusively proven). If nondisclosure is not afforded to a client in the third group, a client in second group would be reticent to come forward with exculpatory facts that, although true, cannot be substantiated because of the client's fear that he may move into the third group and lose the protection of nondisclosure. If nondisclosure is not afforded to the second group, the same fear would hold true for a client in the first group. Therefore, nondisclosure can only serve its intended purpose if it is extended to all three groups."

An attorney trying to uncover suspected client fraud can do so "only if the client trusts the lawyer with information that might be embarrassing or incriminating." If the client knows the attorney has a duty of disclosure, that trust will never develop; therefore, the attorney may not gain the information necessary to uncover the fraud. Disclosure may also "prejudice the defendant in the very matter in which the lawyer is employed to defend him." Admittedly, it is hard to have sympathy for a client who is actually guilty of perpetrating a fraud on the court; but if the

attorney's suspicions turn out to be wrong and the client is not guilty of fraud, the harm to the client may be irreparable. This is a risk too great to take.

Such commentators are defining effective assistance as helping a criminal defendant gain an acquittal, even if the accused committed the crime. Therefore, the lawyer must be allowed to whatever is necessary to get his guilty client acquitted. This is a distortion of the right to counsel. Nothing in the language concerning effective assistance of counsel to suggest that effectiveness is measured solely in terms of whether the defendant is acquitted, nor does a defendant have a right to an acquittal regardless of guilt. The argument of a special obligation for defense attorneys to assist their clients in presenting perjured testimony misperceives the professional advocate's function. "[D]efense counsel's paramount duty [to his client] must be met in conjunction with, rather than in opposition to, other professional obligations. Counsel does have an "obligation to defend with all his skill and energy, but he also has moral and ethical obligations to the court, embodied in the canons of ethics of the profession." The ethical strictures under which an attorney acts forbid him to tender evidence or make statements which he knows to be false as a matter of fact. His activities on behalf of his client are circumscribed by the principles and traditions of the profession and may not include advancing known false testimony in an effort to win his client's cause. It is clear [in this case] that counsel felt, based on his trial preparation, that the eleventh-hour change in appellant's story would result in his client's testifying falsely. Confronted with such a realization, counsel's obligation to both his client and the court is to use "all honorable means to see that justice is done," rather than to go to any lengths in an effort to see that a defendant is acquitted."

VI. THE ETHICS OF EVIDENCE UNDER THE GOOD-FAITH PRINCIPLE

A. FALSE EVIDENCE

1. DISCOVERING FALSE EVIDENCE BEFORE TRIAL

Although it is rare for attorneys to personally create false evidence, it is common for them to be presented with false evidence created by others. A party to an action may fabricate favorable evidence to improve the chances of winning. Family and friends may provide false alibis. A battered woman may falsely recant her statement that her boyfriend has beaten her. These situations also seem easy cases. It is unethical for an attorney to present false evidence. Whether the attorney has personally created it it is irrelevant. A "lawyer shall not knowingly offer evidence the lawyer knows to be false" regardless of the source of that evidence. Lawyers cannot present false and perjured evidence.

For some reason, however, some commentators seem to have a hard time with this basic ethical principle when it is a client who has created the false evidence and wants the lawyer to present it. A few have taken the lawyer-as-whore position, and argued that the lawyer must go along with a client's decision to commit perjury, and must present that false evidence at trial. For example, Liskov argues that the general principle in Model Rule 1.2(a) that "the lawyer shall abide by the client's decision... whether the client will testify" extends to a client's decision to testify falsely,

despite other language in Rule 1.2(d) forbidding the lawyer to "assist a client in conduct the lawyer knows is criminal or fraudulent."

The best known proponent of this view is Monroe Freedman. He has argued that if a client cannot be dissuaded from committing perjury, the lawyer should go ahead and elicit the false testimony and rely on it in closing argument. Freedman rests his argument on the lawyer's duty of loyalty to the client, but in the process reduces that duty from a professional one to that of co-conspirator and criminal accomplice.

It has also been suggested that the lawyer has an obligation to present false and perjured evidence because the client has a "right to testify." Of course, there is no such right. The client, like every witness, only has the right to testify in ways consistent with the rules of evidence and procedure, and has no right to provide testimony in violation of those rules. Rules 601-03 restrict witnesses to testifying under oath which requires that they tell the truth. There is no "right" to testify falsely.

These attempts to justify a lawyer's limited use of false evidence when it has been created by the client are indefensible. There is no exception in the Model Rules for false evidence created by a client, and no suggestion that the lawyer must suddenly abandon his or her personal moral judgment. To the contrary, the ethical principles make clear that an attorney is not simply the client's mouthpiece. The preamble to the Model Rules is explicit:

Many of the lawyer's professional responsibilities are prescribed in the Model Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers..... A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.... In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person.... Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The Supreme Court has also been explicit. The lawyer's role is that of a professional who agrees only to fight for the client within the bounds of the law and ethics. "Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908. .... These principles have been carried through to contemporary codifications of an attorney's professional responsibility. ... Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct ... do not merely authorize disclosure by counsel of client perjury; they require such disclosure. [U]nder no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called "a

search for truth." The suggestion sometimes made that "a lawyer must believe his client, not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury." [Nix v. Whiteside, 475 U.S. 157, 166-67 (1986)]

If a client creates a phony receipt, the attorney may not offer it. If a witness offers to lie and create an alibi, the lawyer may not call that person. If a client is going to lie from one end of his testimony to the other, the lawyer must keep him off the stand. At least as an abstract proposition, these principles are ethically indisputable.

But what if the issue is small fabrications rather than major ones. What if a client intends to testify truthfully most of the time, but will insert one or two pieces of false testimony here and there to strengthen the case? The attorney cannot overreact and refuse to present the truthful evidence in order to keep the false evidence out of the trial. Even if the attorney tries to dissuade the client from committing perjury, and carefully steers around the false evidence on direct examination, the attorney has no real control over whether the client blurts out the false testimony anyway, or the topic is raised on cross-examination. To analyze an attorney's ethical obligation under this circumstance requires that it be divided into two different issues. What must the attorney do before the fact, and what must the attorney do after the fact?

If an attorney learns of a client's or other witness's intent to commit partial perjury before trial, the lawyer's first duty is to try to dissuade that person from giving the false testimony. The attorney should point out that exaggerations and small lies are easily exposed on cross-examination and easily detected by the jury. False favorable testimony therefore will end up hurting rather than helping. In addition, perjury is a crime that can be separately prosecuted, or considered by the judge as an aggravating circumstance at time of sentencing.

If the attorney cannot get a client to agree not to tell small lies, the attorney's second duty is to seek to withdraw from representation. Withdrawal would seem to be required under Model Rule 1.16(a)(1), because continued representation "will result in violation of the rules of professional conduct or other law," although it is not so universally recognized as dissuasion. Some commentators have criticized the withdrawal approach as serving no functional purpose because the new attorney will face the same issue. In criminal cases, withdrawal might not work because most defendants are represented by public defenders or assigned counsel who will probably not be permitted to withdraw. Withdrawal also may implicate other ethical principles, for example, if the case is so close to trial that a lawyer cannot ethically withdraw without jeopardizing the client's case. Withdrawal would also seem an inappropriate response if it is a witness, rather than the client, who plans to exaggerate.

If withdrawal is refused or inappropriate, the attorney should attempt to steer the direct examination around the false testimony. This may not solve the problem, however. Despite the attorney's best efforts, the client may give the false testimony anyway -- slipping it in on direct, or volunteering it during cross-examination. In these situations, the attorney is not relieved of ethical obligation just because they attorney has not intentionally used false evidence. The false evidence is there in front of the jury, and the lawyer must do something about it.

2. DISCOVERING FALSE EVIDENCE AFTER THE FACT

When I was an assistant district attorney in New York, I prosecuted a case in which the victim told police he had been robbed of two hundred dollars. Shortly before trial, he discovered the existence of the Victim's Compensation Fund. When I asked him at trial how much money had been taken from him, he smiled and said, "Two thousand dollars." Despite the good faith of an attorney, false testimony happens.

When an attorney discovers that false evidence has been presented to the court, the attorney is required to take remedial action even though it is not the attorney's fault. Model Rule 3.3 (a)(4) states: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

Despite this clear statement in the Model Rules, some commentators have argued that a lawyer is not obligated to take remedial action if the false evidence came from the client. Several justifications are offered; none is persuasive. Horgan suggests that taking remedial action would violate the attorney-client privilege and have a chilling effect on the attorney-client relationship, so an attorney should do nothing. The problem is that presenting false evidence is perjury, and the attorney-client privilege does not apply to crimes and frauds. Liskov argues that even if there is no privilege, taking remedial action would violate the requirement in Model Rule 1.6 that "a lawyer shall not reveal information relating to representation of a client unless the client consents." However, the commentary says that the rule does not apply when the client engages in conduct such as perjury that is criminal or fraudulent. Freedman suggests that acting against a client's wishes violates the right to counsel. The Supreme Court, however, has ruled to the contrary that a defendants "have no "right" to insist on counsel's assistance or silence. [Nix v. Whiteside, 475 U.S. at 172.] The arguments are belied by the clear requirement that remedial action is mandatory.

Model Rule 3.3 does not say what form that remedial action must take, and there is some debate about it. The preferred remedies for false evidence discovered before trial -- dissuasion and withdrawal -- are technically available for after-the-fact discoveries, but may not be realistic. The lawyer could ask for a recess, woodshed the client, and seek to persuade him or her to withdraw the false evidence. The only problem is that judges are not generally inclined to permit attorneys to interrupt their direct examinations in order to hold a quick coaching session with their clients on what to say next, although this would appear to be a "critical stage" of the proceedings at which the client has a right to counsel. An attorney could also ask to withdraw in the middle of a trial, but it is inconceivable that a judge would permit it. It also would seem to violate Model Rule 1.16(b)'s prohibition against withdrawal under conditions that would have a "material adverse effect" on the client.

The presumptive remedy would seem to be disclosure. Model Rule 3.3(a)(2) requires that a lawyer must "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Perjury and presenting false evidence are criminal and fraudulent acts. Dissuasion and withdrawal are unlikely to be adequate, so the disclosure

becomes "necessary." The commentary explains: "[T]he rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement."

Although the Commentary cautions that it "has been intensely debated" whether the requirement of remedial action applies in criminal cases, it does not take the position that the requirement is in fact ethically debatable. To the contrary, the commentary rejects the suggestion "that the advocate be entirely excused from the duty to reveal he perjury if the perjury is that of the [criminal] client" because it would makes the attorney a knowing instrument of perjury. If dissuasion has not worked, "the advocate should make disclosure to the court." The disclosure requirement is not optional; it is mandatory and applies in criminal cases as well as civil.

B. INADMISSIBLE EVIDENCE

One part of the good-faith basis principle is that an attorney must have a legal basis for offering evidence. The attorney must be able to point to a rule of evidence that plausibly supports the item's admissibility, and also have a subjective belief that the evidence properly be admitted under that rule. To offer inadmissible evidence is therefore unethical.

The ethical prohibition against trying to slip in inadmissible evidence seems fairly clear under the Model Rules, though it is not stated explicitly. Model Rule 3.4 (c) states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal," and the rules of a tribunal include its evidence rules. Offering evidence that is inadmissible would seem to be knowingly disobeying court rules, as would asking an improper question and then withdrawing it if there is an objection. Rule 3.4(e) states that a lawyer shall not "in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will be supported by admissible evidence." This means more than just that a lawyer may not mention inadmissible evidence in opening statement. An attempt to offer it or get it before the jury would seem also to fall within the idea of an allusion to inadmissible evidence.

A lawyer should not attempt to get before the jury evidence which is improper. In all cases in which a lawyer has any doubt about the propriety of any disclosures to the jury, a request should be made for leave to approach the bench and obtain a ruling out of the jury's hearing, either by propounding the question and obtaining a ruling or by making an offer of proof.

An argument can be made that it is not the attorney's duty in the adversary system to anticipate the opponent's objections and the judge's rulings. The argument runs like this: Judges are given broad discretion to rule on the admissibility of evidence, so they might allow evidence the attorney thinks is inadmissible. Evidence not objected to is entitled to consideration by the jury, and an attorney does not know if the opponent will object. Therefore, an attorney never "knows" for sure whether evidence will be ruled admissible or inadmissible. This view may be compatible

with the approach that the attorney must do everything possible for a client except present false evidence, but it cannot be squared with the good-faith principle. The attorney is offering evidence without a good-faith basis regardless of whether the opponent is competent enough to object or the judge will rule correctly.

The one aspect of the inadmissible-evidence problem that has received some attention in the ethics literature is the "side show." A side show is a non-evidentiary visual display staged for the jurors' benefit that is intended to have an influence on the jurors without ever find its way into evidence. The examples of this problem are drawn mostly from the past, so it is not clear whether this is a genuine problem today. Fortune and Underwood collected the following examples:

a. In a personal injury case in which plaintiff lost a leg, plaintiff's lawyer left an L-shaped package wrapped in butcher paper on counsel table throughout trial.

b. In a case brought by a widower for the wrongful death of his wife, the defendant's lawyer arranged for an attractive young woman to pretend to be the plaintiff's new girlfriend, sit near him during trial, and occasionally lean over and ask him innocuous questions, and touch him gently.

c. Defense counsel arranged for a look-alike to don the defendant's clothes and sit in the defendant's place, while the real defendant sat in the back of the courtroom. This caused several eyewitnesses to misidentify the accused.

c. In a criminal case in front of a predominantly African-American jury, the defense attorney arranged to have boxing champion Joe Louis walk into the courtroom in full view of the jury and shake his client's hand.

Such displays are not just clever courtroom advocacy, nor are they excusable because they do not rise to the level of presenting false evidence. They are unethical violations of the good-faith principle because the attorney has no legal basis for staging a side show. It is improper under rules of procedure and evidence.

I am concerned not only with evidence that violates the substantive rules of evidence because it is irrelevant, unauthenticated, hearsay, and so forth, but also violations of the procedural rules for introducing evidence. Procedural rules govern the proper form of the questions and answers that make up the examinations. The best known is the rule against asking leading questions on direct examination, but other rules preclude repetitive interrogation and questions that are argumentative, assume facts not in evidence, or misstate the evidence.

Despite these procedural rules, attorneys frequently ask improper questions or make improper rhetorical comments, especially during cross-examination.

The intentional asking of improper questions for rhetorical purposes seems also to contravene the good-faith basis principle. The attorney lacks a reasonable belief that the question as asked is

proper, and is therefore violating an established rule of the tribunal. Overly aggressive cross-examination that intimidates, browbeats or harasses a witness is also unethical.

Closely related to the rhetorical question is the rhetorical objection, also known as a "speaking objection." Under the customary rules of evidence, attorneys may state the legal basis for an objection within the hearing of the jury, but must make any extended argument outside the jury's hearing. This rule is routinely tested by attorneys who make "speaking objections" containing short arguments or summaries of evidence aimed at the jury. In most instances, speaking objections are clear, intentional violations of customary objection procedure, and therefore unethical. For example:

Q. What did you see next?
A. I saw a blue car drive by that looked like the defendant's car.
Defense: Objection, irrelevant and prejudicial. We've already established that the defendant was home with his mother, so it couldn't have been his car the witness saw.

Not all speaking objections are clearly unethical, however. For example, an attorney might object to the opinion of a medical expert by saying:

"This opinion is unreliable because it is based solely on the self-serving complaints of the plaintiff, made after his lawyer told him he would need an expert to testify for him."

Does this objection violate the good-faith principle because it is deliberately argumentative, or is it merely a restatement of Fed. R. Evid. 703's requirement that the facts or data used by an expert must be shown to be reasonably reliable? Keeton suggests the following solution:

Using a frivolous objection as a vehicle for expressing some argument to the jury is a practice condemned both by rules of procedure and by professional standards. On the other hand, expressing serious objections in a manner calculated to appeal to the jury as well as the court is generally regarded as a proper practice, and clearly it is proper to give attention to phrasing objections in such a way as to avoid causing an affirmatively adverse reaction by jurors. [However, if the argumentative part of the objection is overemphasized,] your statement is subject to the same criticism as a frivolous objection used for making an argument. The distinction is primarily one of degree, and great differences of opinion exist regarding such practices.

C. DUBIOUS EVIDENCE

The problem of misleading, unreliable and incomplete evidence is hard -- it is neither false nor inadmissible. What happens if an attorney by selective use of evidence, trickery, and half-truths, uses true evidence to create a false impression? This issue has been discussed at length in analysis of Monroe Freedman's question, "Is it proper to discredit a witness whom you know to be telling the truth?."

"our client has been ... accused of a robbery committed at 16th and P Streets at 11:00 p.m. He tells you [he was in the vicinity] at 10:55 that evening, but that he was walking east, away from the scene of the crime, and that, by 11:00 p.m., he was six blocks away. At the trial, [the prosecution calls] an elderly woman who is somewhat nervous and who wears glasses. She testifies truthfully and accurately that she saw your client at 15th and P Streets at 10:55 p.m."

Can you attempt to destroy the witness's credibility through cross-examination designed to show that she is easily confused and has poor eyesight, to mislead the jury and create the false impression that she is mistaken in her identification?

The problem is not confined to cross-examination, of course. Misleading evidence that creates a false impressions may be also be offered on direct examination. For example, extending Freedman's hypothetical, suppose the day of the crime was June 1, but the elderly witness mistakenly testifies the crime took place on June 2. Your client has admitted to you that he committed the crime on June 1, but has an airtight alibi for June 2. May an attorney in addition to vigorously cross-examine the witness about her failing eyesight, present truthful testimony of the client's alibi on June 2? None of the evidence is false, but it misleads the jury and is almost certainly going to lead to an unjustified acquittal of the armed robber.

Freedman thinks there is nothing unethical about presenting and relying on truthful but misleading evidence if it is genuinely beneficial to the client and increases his chances of acquittal.

"[I]f you should refuse to cross-examine her because she is telling the truth, your client may well feel betrayed, since you knew of the witness's veracity only because your client confided in you, under your assurance that his truthfulness would not prejudice him. [T]he same policy that supports the obligation of confidentiality precludes the attorney from prejudicing his client's interest in any other way because of knowledge gained in his professional capacity. [If] a lawyer fails to cross-examine only because his client ... has been candid with him, [the lawyer is using those confidences against his client.] The client's confidences must "upon all occasions be inviolable," to avoid the "greater mischiefs" that would probably result if a client could not feel free "to repose [confidence] in the attorney to whom he resorts for legal advice and assistance" Destroy that confidence, and "a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case."

Therefore, Freedman concludes, the attorney is obligated to attack the reliability or credibility of the victim, and by extension, offer the alibi testimony.

Yet, doesn't intentionally creating a false impression violate the good-faith basis principle? If the client has correctly identified your client, you do not have a good faith basis for insinuating that she is wrong because of poor eyesight, and it is hard to imagine that poor eyesight is relevant to any other purpose. Poor eyesight is not a material issue in its own right. Proving that she has poor eyesight or other physical defect "just for the heck of it" violates both the part of the good faith basis principle that requires a believe that evidence is relevant, and the prohibition against using

"means that have no substantial purpose other than to embarrass" a witness.

Francis Wellman's classic The Art of Cross Examination sets a higher ethical standard. The purpose of cross-examination is to "catch truth," not to make the false look true and the true, false: "The purpose of cross-examination should be to catch truth, ever an elusive fugitive. If the testimony of a witness is wholly false, cross-examination is the first step in an effort to destroy that which is false.... If the testimony of a witness is false only in the sense that it exaggerates, distorts, garbles, or creates a wrong sense of proportion, then the function of cross-examination is to whittle down the story to its proper size and its proper relation to other facts....[But if] the cross-examiner believes the story told to be true and not exaggerated ... then what is indicated is not a "vigorous" cross-examination but a negotiation for adjustment during the luncheon hour.... No client is entitled to have his lawyer score a triumph by superior wits over a witness who the lawyer believes is telling the truth."

The same is true for presenting the misleading alibi evidence. The attorney lacks a good faith basis for believing that evidence of his client's alibi on June 2 is relevant to a crime that happened on the first. In the well known words of Lon Fuller, a lawyer "plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature." Statements and evidence by an attorney designed to make the jury belief something which is not true "is a species of false statement of fact to a tribunal, which are condemned by Model Rule 3.3(a)(1)." Indeed, when the attorney first hears the witness mistakenly give the day of the crime as June 2, the attorney has discovered that false evidence has been presented to the jury, and is required to take appropriate remedial action -- disclose the falsity. The attorney may not ethically take advantage of unexpected favorable false evidence, even if the attorney had nothing to do with its creation.

VII. CONCLUSION.

The ethics of evidence involve more than a duty to be a zealous advocate and a rule against using false evidence. If that were all there were to it, trial attorneys would be ethically obligated to present unreliable and misleading evidence to a jury in an effort to deceive them, and to try to smuggle inadmissible evidence into the trial by ignoring the rules of evidence. Although some commentators have argued under slightly different terminology for exactly this result, it is clearly unacceptable. Ethics are not simply rules to be interpreted in the light most favorable to our clients, but moral principles that are supposed to guide our behavior as members of an honorable profession.

The ethic that proves the most helpful in analyzing how attorney gather, prepare and present evidence is the good-faith principle. Lawyers have an obligation to present only evidence which they believe to be the truthful, unaltered, natural recollection of witnesses, and which is admissible under the rules of evidence. They should not fabricate evidence or use false evidence fabricated by a client. They should not manipulate evidence in a way that misleads the jury. They should not create unreliable evidence through suggestive preparation techniques or outright

bribery. They have an obligation to make sure that all material evidence is before the jury. Underwood is wrong when he says there is no rule against trickery. The good-faith principle is expressed in a dozen ways throughout the Model Rules, and it should play a more prominent role in the evidentiary decisions we make.