Zealous Advocacy vs. Truth

by Martin J. Siegel

Was it Clarence Darrow? Thurgood Marshall? Atticus Finch? Maybe you first thought of law school because it pays well or your family has lots of lawyers or there seemed little else to do with a liberal arts degree. But then you learned about the lawyer crusading for truth in an unjust world, and suddenly there was nobility in it. If that seems like a distant memory, it may be because, somewhere along the line, the craft of lawyering inevitably overwhelms the justice of it. Clients pay our bills, not abstractions like truth or justice, and you might have noticed that clients like to win. So gradually, imperceptibly, we transfer our admiration to the supreme tacticians: the litigators and trial mavens whose mastery of the tricks of our trade produce stupendous victories, for which they are celebrated among lawyers far and wide. The color of their hats may not matter. We may not even notice.

Still, even as we become seasoned litigators focused on winning, we remember certain minimal obligations to the truth. We know we cannot suborn perjury, shred relevant documents, or tell lies to judges. But what about the tougher calls? Through the life of a case, at nearly every turn, there are more difficult choices to be made between effective advocacy and what we owe the truth, even if the truth might cut against the client. Striving to balance the two is a recurrent part of the litigator's life, and getting the balance right hopefully helps inform our professional self-regard no less than winning.

Nowhere is watching the line between truth and aggressive lawyering more important than in conducting discovery. Tactics that might go too far when conducted in the open do far more damage when carried out in the shadows, where the opposition never learns of them and cannot respond with hard blows of its own. Questionable allegations in pleadings, unfair questions in cross-examination, and dubious arguments to the court or jury are visible to opposing counsel and can often be exposed or countered. But when a document never comes to light because a request for production was construed too narrowly, or a witness shades his testimony as a result of some adroit behind-the-scenes coaching, the actors in the system who might serve as counterweights—opposing counsel, the court, even jurors—have less to work with. The basic factual script from which the entire drama proceeds has been altered in deeper ways, and more violence has been done to the truth.

The rules governing counsel's adherence to truth in discovery include Federal Rule of Civil Procedure 37, which provides the authority by which courts can sanction parties for discovery abuse; Model Rule 3.4(d), which proscribes "fail[ure] to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party"; Model Rule 3.4(b), which provides that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law"; Model Rule 3.3(a)(4), which precludes lawyers from knowingly "offer[ing] evidence that the lawyer knows to be false"; and Model Rule 8.4(c), which states that it is misconduct for lawyers to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." In *Geders v. United States*, 425 U.S. 80, 90 n. 3 (1976), the Supreme Court held: "Any violations of these strictures would constitute a most serious breach of the attorney's duty to the court, to be treated accordingly." One district court recently set forth the wide array of sanctions for witness coaching and violation of a sequestration order:

> . . . evidence can be excluded or stricken; lawyers can be excluded from the courtroom; adverse inferences can be drawn; juries can be instructed that the sequestration

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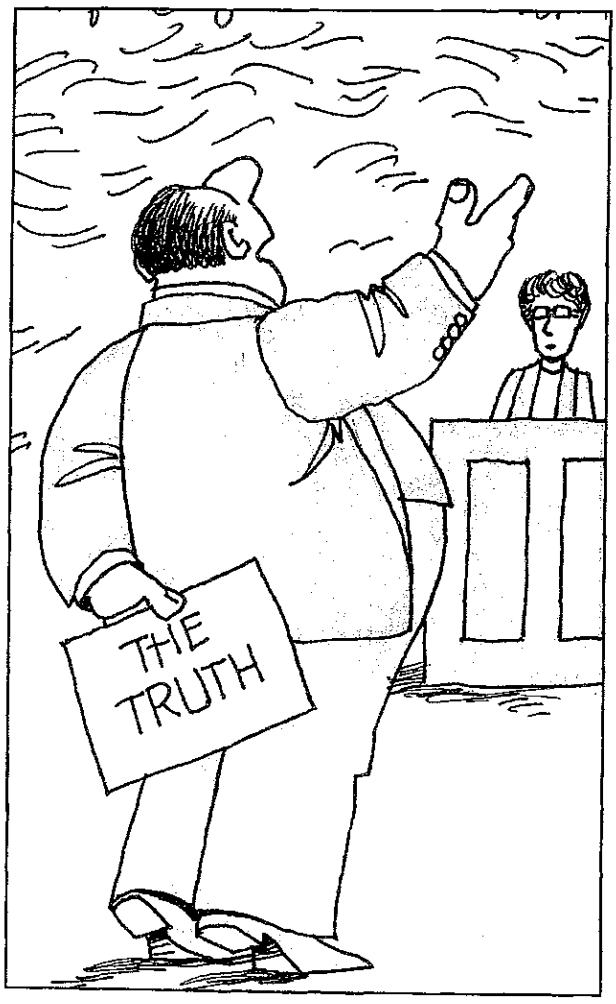
> order has been violated; a party or witness can be held in contempt; monetary sanctions can be imposed on parties or lawyers; disciplinary proceedings can be instituted.

Mineba Co., Ltd. v. Papst, 374 F. Supp. 2d 231, 237 (D.D.C. 2005).

Selecting witnesses to testify can present initial dilemmas. As a newly minted lawyer, practicing before the changes in Federal Rule of Civil Procedure 26 made disclosures of relevant witnesses and information mandatory, I once had to choose which witness to present as the representative of my client on a particular topic. Opposing counsel had proceeded informally rather than notice a deposition under Rule 30(b)(6). After interviewing the two possibilities identified to me by the client, it was clear that one recalled the salient events in a way that would be better for the case than the other. In the absence of an interrogatory to identify all people with knowledge of the subject matter, was I obliged to cough up the witness who would do more harm to the case? I decided it was my adversary's job to ask the right questions and identify the knowledgeable witnesses through written discovery or the deposition of the witness presented. If she wanted the different stories different witnesses might tell, I concluded, it was up to her to ask who they were and depose them. Although I believe this was proper representation of my client, I have always been a little uncomfortable about the fact that no one heard from a witness who might have said damaging things about my case.



Preparing clients and witnesses for depositions also raises questions about what we owe to the truth of the case. Instances of witness coaching that would seem to transgress these rules have been in the news in the last few years. During the investigation of President Clinton, Linda Tripp reportedly received a memo counseling her about what to say with regard to allegations made by White House aide Kathleen Willey that the President had sexually harassed her. The memo, entitled "Talking Points," informed Tripp: "[Y]ou do not believe what [Willey] claimed happened really happened"; "You now find it completely plausible that she herself smeared her lipstick, untucked her blouse, etc."; "You never saw [Willey] go into the oval office, or come out of the oval office"; and "You have never observed the President behaving inappropriately with anybody." *See* Michael Higgins, "Fine Line," 84 *ABA J.* 52-54 (May 1998). These were not, supposedly, a record of Tripp's recollections but a directive scripting her testimony.

Another recent instance of apparent coaching came to light when a memo entitled "Preparing for your deposition," prepared by a legal assistant [at the plantiff's law firm] was inadvertenty produced to the defense in an asbestos case. "It is important," the memo stated,

> to maintain that you never saw any labels on asbestos products that said DANGER or WARNING . . . be CONFIDENT that you saw just as much of one brand [of asbestos product] as the others . . . [Defense attorneys] have NO RECORDS to tell them what products were used on a particular job, even if they act as if they do.

Id.

These seeming attempts at shaping testimony were clumsily direct and, more surprisingly, reduced to writing, but the conflicts that crop up in preparing most witnesses to testify are subtler. Suppose you are preparing a client for her deposition in a complicated commercial case that requires her to delve into meetings and business deals from many years ago. The client, no dummy, knows full well which sort of answers will be helpful; as your day together wears on, she takes to answering more and more questions in the alternative, as if you can tell her which "true" answer sounds a little better. She doesn't exactly want to lie, but the truth isn't entirely clear either, and you are struck by her malleability.

Useful things to say to this sort of client might include reminding her that trying to calculate the effect of every answer on the jury will inevitably result in testimony that sounds halting and untrue; that no one expects every detail to fall into place or to be perfectly consistent with every other detail; that the "bad" answers will not be as bad as she thinks; that you will find a way to deal with them later, however the testimony comes out; that every case has some "bad facts"; that as long as she does not volunteer the information, some of it might not surface anyway; and that gilding the lily might get her in trouble when contradictory witnesses or documents emerge. The best tone in these discussions is cajoling, not schoolmarmish, appealing to the client's self-interest all the while. If your efforts succeed in moderating some of the client's more self-serving instincts while still casting the facts in as good a light as legitimately possible, you have done your duty.

Even without witnesses or clients eager to improve their stories, properly preparing witnesses requires giving thought to how to steer clear of unwittingly shaping testimony. Some cautions that lawyers and commentators often voice include:

1. Don't overdo the standard advice about not volunteering information. Preparation sessions with clients and witnesses invariably begin with the chestnut about answering only the question asked and refraining from volunteering information. This is sound advice, of course, but it can be overemphasized or misinterpreted by clients and witnesses. Witnesses are required to give complete and truthful answers, and those primed to give every question the most cramped interpretation may end up conveying something less than the whole truth. Witnesses should be told not to venture off the reservation to answer questions not asked, but also reminded that this does not mean omitting properly responsive information to the questions that actually are asked.

2. Don't dictate the facts to the witness. Lawyers sometimes begin preparation sessions by loading up the client or witness with his side's version of the facts, or information about how other witnesses have testified. This may be an innocuous effort to bring the witness up to speed on the case, or it may be interpreted as a subtle signal to "get on board" and harmonize stories. Absent a sequestration or applicable protective order, there is no bar to one witness learning of another's recollections, and the fact that a witness knows what other witnesses have said can always be explored in the deposition. But counsel who want to share facts and testimony with soon-to-be witnesses should remind them that independent and somewhat differing recollections are normal and expected, and that there is no expectation of conformity.

3. Don't stress the legal effect of particular answers. Another way to unintentionally influence clients or witnesses is to preface preparation with a lecture on the legal effect of testifying one way or another. In the classic movie *Anatomy of a Murder*, a lawyer played by Jimmy Stewart tells his murder defendant client that "bad temper" won't get him off. "Well, I mean, I must have been crazy," the client responds, getting Stewart's message. "Am I getting warmer?" "See if you can remember just how crazy you were," Stewart instructs. When witnesses and clients come to understand that certain answers are unfavorable for the case, they will be sorely tempted to adjust their recollections accordingly. Clients should appreciate the legal framework governing their cases, but it is a good idea to divorce that conversation from the task of preparing to testify.

4. Start with the witness's story. Deposition preparation should begin with a simple, uninterrupted elicitation of the client's or witness's recollections, using open-ended questions if necessary. Having searched their memories and committed to their relevant recollections, prospective witnesses are less likely to adopt other versions or claim lack of recall because they believe it is expected or helpful. Once the witness or client independently sets forth what he remembers, the recollections can be tested with mock questioning and review of relevant documents.

A subspecies of witness coaching—violating sequestration orders—has also been in the news lately. In the Zacarias Moussaoui trial, the court found that Carla Martin, an attorney at the Transportation Security Administration assisting the prosecution, violated the court's sequestration order by providing the testimony of trial witnesses to employees of the Federal Aviation Administration scheduled to testify for the government, as well as by suggesting how they should testify in light of prior testimony and other developments in the case. *See* Stephen Labaton & Matthew Wald, "Lawyer Thrust into Spotlight After Misstep in Terror Case," *N.Y. Times*, Mar. 15, 2006, at A1. The court admonished Martin, whose lawyer indicated she would assert her Fifth Amendment right against self-incrimination if asked to testify, and excluded the tainted FAA witnesses, thereby jeopardizing the government's efforts to obtain the death penalty for Moussaoui. *See id.* Although the judge overseeing the Moussaoui sentencing reacted strongly to the violation of her sequestration order, the Fourth Circuit spoke for most courts in writing that cross-examination is usually "entirely appropriate *and sufficient* to address the issue . . . [T]he adversary system ordinarily can be trusted to separate the liars from the truthful." *United States v. Rhynes*, 218 F.3d 310, 320, 322 (4th Cir. 2000) (emphasis added).

Obtaining affidavits from witnesses can present challenges too. In a Texas case, lawyers met extensively with a witness and drafted an affidavit for her that included statements she had not previously approved, though they pointed out the new language and told her to read the affidavit carefully. *See Resolution Trust Corp. v. Bright*, 6 F.3d 336, 338-40 (5th Cir. 1993). When the lawyers repeatedly pressed her to adopt the statements and include them in her affidavit, at one point showing her extrinsic evidence they believed established their truthfulness, she declined. Later, she allowed as how one of the lawyers had virtually "browbeaten" her to accept their "slant" on the facts. After four full days of hearings on the matter, the district court concluded that the lawyers had attempted to "manufacture" evidence, and he disqualified them from practicing in his court, disqualified their law firm from continuing to represent the client, and assessed $110,000 of the adversary's attorneys fees. Although the Fifth Circuit reversed the district court's decision—emphasizing that the lawyers believed their additions to the affidavit were true and never hid their bias as advocates—the case illustrates how lawyers who lean on witnesses to change testimony can run into trouble. In preparing witness affidavits, lawyers are well advised to confirm repeatedly that the witness is comfortable with the content; that the averments are the witness's, not counsel's; that statements and wording can be changed if the witness prefers; that the affidavit is under penalty of perjury; and that the witness will have to stand by the statements and the specific language in the affidavit in a deposition or open court.

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With the end of discovery, the battle between truth and zealous advocacy shifts to the trial. Our trials are said to trace their origins to the system of dispute resolution by personal

warfare used in Norman England, when surrogates could be deployed to bludgeon an opponent into submission and make him cry "craven," that is, confess to being a liar. *See* R.J. Gerber, "Victory vs. Truth: The Adversary System and Its Ethics," 19 *Ariz. St. L.J.* 3, 4-5 (1987). So it is to be expected that even now, we think of trials as combat. Because the start of trial means that months or years of posturing, revelations learned in discovery, negotiations or mediation, and pretrial motions have all failed to dispose of the case, it is not surprising that aggressive and creative advocacy reaches its desperate crescendo in the courtroom, with truth suffering accordingly. Speaking of the lawyer at trial in a widely cited lecture criticizing the imbalance between truth and advocacy, Judge Marvin Frankel commented:

> His is not the search for truth as such. To put that thought more exactly, the truth and advocacy are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time . . . [Trial lawyers] are not to pass judgment, but only to marshal our skills to present and test the witnesses and other evidence—the skills being to make the most of these for our side and the least for the opposition. What will out, we sometimes tell ourselves and often tell others, is the truth. And, if worse comes to worst, in the end, who really knows what is truth? There is much in this of cant, hypocrisy, and convenient overlooking.

Marvin E. Frankel, "The Search for Truth: An Umpireal View," 123 *U. Pa. L. Rev.* 1031, 1038-39 (1975).

The lawyer's job at trial is to assemble the strands of evidence supporting her client's version of things, wrap the useful pieces into a coherent and compelling narrative that hopefully explains and describes the relevant events, and offer that narrative as "the truth" of what happened. Although legal scholar and psychologist James Marshall wrote years before the advent of PowerPoint, he anticipated its use at trial when he wrote:

> Testimony is constantly dissected and contradicted and reshaped toward partisan ends. That is the essence of a trial; it is not a scientific or philosophical quest for some absolute truth, but a bitter proceeding in which evidence is cut into small pieces, distorted, analyzed, challenged by the opposition, and reconstructed imperfectly in summation.

Franklin Strier, "Making Jury Trials More Truthful," 30 *U.C. Davis L. Rev.* 95, 106-07 (Fall 1996) (quoting James Marshall, *Law and Psychology in Conflict* 148 (2d ed. 1980)).

In this atmosphere, tactical opportunities for creative lawyers to distort the truth are nearly limitless. Most blatant are what used to be called "dumb shows"—stunts contrived to distract the jurors from something damaging or point the jurors to something not in evidence. In the age before courtrooms were smoke-free, Clarence Darrow would insert a wire into his lit cigar so the jury would be distracted by the long string of ashes, instead of focusing on his adversary's closing argument. *See* Gerber, "Victory vs. Truth," 19 *Ariz. St. J.*, at 16. Similarly, a veteran criminal defense lawyer described an extraordinarily blatant but effective dumb show:

> If the kid's a crawler, the best time to let him loose is during final argument. Imagine that little tyke crawling right up to you (make sure he comes to you and not the DA or, worse yet, the judge; a smear of Gerber's peaches around the cuff worked for me) while you're saying: "Don't strike down this good man, father to little Jimmy. Why, Jimmy!" Pick the child up and give him to Daddy. If the DA objects and gets them separated, so much the better. Moses himself couldn't part a father and a son without earning disfavor in the eyes of the jury. Babies are truly miracles of life; they've saved many a father years of long-distance parenting. If your client's childless, rent a kid for trial.

Id. (quoting Wilkes, "Life in the Fast Lane: The Adversary Ethics of an Ex-Lawyer," 7 *Criminal Defense* 11, 11-12 (Mar.-Apr. 1980)). In one civil case, a hefty plaintiff's verdict in an insurance collection case was reversed on appeal because the plaintiff's lawyer left a copy of a three-year-old newspaper article with the enlarged headline, "Didn't Settle in Policy Limits; OK Mental Suffering Award," on the table in full and obvious view of the jury. *See Richardson v. Employers Liab. Assurance Corp.*, 25 Cal. App. 3d 232, 242-44 (Cal. Ct. App.–2nd Dist.1972).

Dumb shows aside, there are craftier ways to poison a jury. For example, if offering perjured testimony is *verboten*, what about the gray zone between evidence known to be false and evidence that just smells a little funny but is not the product of a conscious attempt to deceive? In a recent product liability case involving an allegedly defective compact car, defense counsel proposed to offer testimony from the state trooper who investigated the accident, stating that the child rendered a quadriplegic in the collision was sharing a seatbelt with his cousin in the back seat. The evidence stemmed from comments the officer reported hearing at the scene from the injured boy's mother and others. Leaving aside the hearsay problem, the testimony was also directly contradicted by the defendant's own expert, who agreed with the plaintiff's expert and opined that the boys could not have been double-buckled. Still, as defense counsel correctly pointed out, parties can impeach their own experts and are free to present alternative theories. The jury should be allowed to decide whether to believe the officer or the expert, he argued. It became apparent during the hearing on the motion in limine that defense counsel did not actually believe the boys shared the seatbelt, but it was equally apparent that the officer's testimony might influence jurors to give it more credence than complicated expert seatbelt analysis. At a minimum, it would significantly confuse things.

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Most lawyers would probably consider the question whether to offer testimony like the trooper's as a matter of strategy, not ethics. On the one hand, erecting an absolute bar to offering evidence doubted by the sponsoring lawyer seems excessive. On the other, blithely ignoring the probable falsity

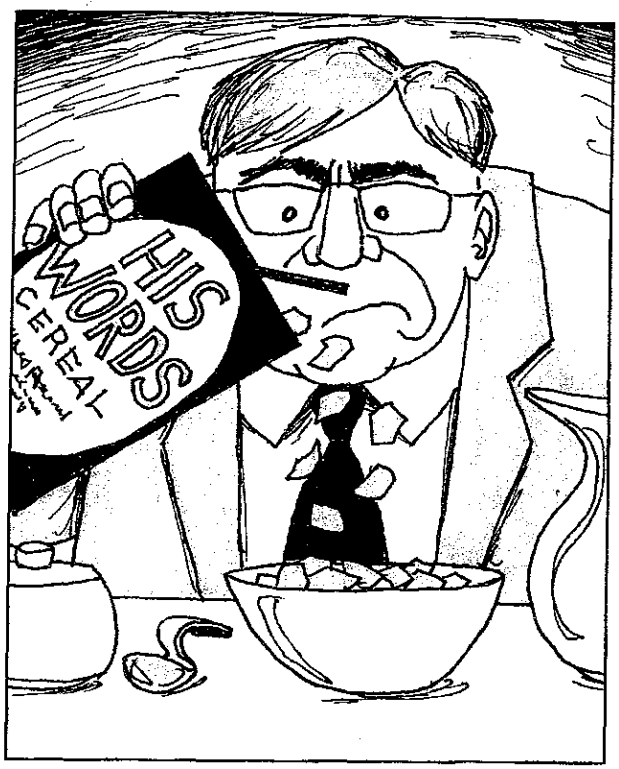
of the testimony and actively trying to confuse jurors is out of step with counsel's duty to shepherd the jury toward ascertaining the truth. There is no bright line, but lawyers in this situation should at least think beyond strategy and take account of the ethical and systemic dimensions of the issue. Put simply, the more likely the evidence is to be false, the more counsel ought to resist the temptation to insert it into the trial anyway, even if it might be helpful.

Then there is cross-examination. Defenders of the adversary system exalt it as the greatest tool for ferreting out truth in trials, and they are undoubtedly right in the sense that cross-examination is the only opportunity for the fact-finder to receive evidence that has not been carefully scripted in advance. Since trials consist of dueling presentations designed to sway the jury to each side's theme, cross-examination is essential to the testing of both alternate realities.

But if cross-examination can promote the search for truth, it can also obfuscate it. Zealous representation at trial may call for trying to destroy the credibility of adverse witnesses, but there are limits to what is permissible—limits that, like cross-examination itself, are intended to promote truth seeking. The limits are especially important because effective cross-examination is virtually testimony from counsel. Consequently, questions in cross-examination may not hint at matters not in evidence. For example, in a condemnation case in California, counsel wished to suggest that a different highway from the one at issue had caused nearby businesses to lose customers, and so repeatedly asked a witness during cross-examination: "Did you know their business dropped 50 percent and some went broke and closed up?" *People v. Lillard*, 219 Cal. App. 2d 368, 379 (Cal. Ct. App.—3rd Dist. 1963). Because the record contained no evidence of the facts suggested by the questioning, it was properly disallowed. *See id.* Another example occurred in a criminal case where the prosecutor repeatedly asked the defendant whether he had rehearsed his testimony with counsel. *See State v. Emmett*, 839 P.2d 781, 786 (Utah 1992). Despite the defendant's denials, the questioning culminated with: "He didn't tell you to face the jury and tell you exactly what to say?" *Id.* The cross-examination was improper because of the absence of any evidence that defense counsel manufactured the defendant's testimony: "Otherwise, the only limit on such a line of questioning would be the prosecutor's imagination." *Id.*

Cross-examination intended to prejudice jurors is equally impermissible. Suppose, for example, your adversary's expert on lost profits, an accountant, turns out to have declared bankruptcy years ago and, to pay off his debts, borrowed from clients. And suppose he had been investigated, though not sanctioned, by his state licensing board for forging an endorsement on a client's check. Juicy, tempting targets for cross-examination—but they bear on neither the expert's veracity nor any other issue relevant to his lost-profits testimony. They do, however, obviously bias the jury against him and taint most anything he might have to say. Faced with these facts, the Eleventh Circuit held the cross-examination improper. *See Ad-Vantage Tel. Directory Consults., Inc. v. GTE Directories Corp.*, 37 F.3d 1460, 1464-65 (11th Cir. 1994).

Cross-examination designed to force the assertion of a privilege is equally improper. Requiring a witness to repeatedly refuse to answer a question she is legally entitled not to answer—because the matter is covered by the attorney-client



privilege, for example—is improper because it implies to the unsuspecting jury that the witness is simply hiding something. Similarly, cross-examining a witness about a matter she could not know about is impermissible because it falsely implies the witness is untruthful or should not be testifying because she is uninformed.

If the truth can take a beating in cross-examination, closing argument offers the chance to deliver the final blow. Distortions or untruths in opening statements do comparatively little damage because they can be exposed during the course of the trial and their author forced to "eat his words" at the time of his adversary's choosing. Moreover, the restriction on argument in openings provides at least some limit on the degree to which they can be used to distort the truth. Closing arguments, on the other hand, have none of these safeguards. Opposing counsel has only one opportunity to respond, assuming the offensive statement does not rear its head in rebuttal. Moreover, most lawyers are loath to object to their adversaries' closing arguments.

Common transgressions in closing argument include misstatements of evidence, attacks on opposing counsel, personally vouching for evidence, and prejudicial statements that have no bearing on the factual matters to be decided by the jury but are meant to sway its decision through bias. All are barred by Model Rule 3.4(e). One Florida lawyer defending an insurance company in a personal injury matter managed, incredibly, to violate most of these rules in a single closing by telling the jury that the plaintiff's expert doctor found permanent injury "as he usually does"; volunteering his own opinion of the witnesses' qualifications and truthfulness; remarking that the plaintiff sought "not a small fortune, a large one"; saying "Don't let little Nicholas [the plaintiff's

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child] think that this is the way you get from one end of life to the other"; telling the jury "I'm here to tell you the truth"; claiming that the plaintiff "should have said 'thank goodness I wasn't injured more seriously'" instead of seeking compensation; and, ironically, accusing the plaintiff's lawyer of being willing to do "anything to advance the cause." *Schubert v. Allstate Ins. Co.*, 603 So.2d 554, 555 (Fl. App.–5th Dist. 1992). The argument worked at trial, earning the insurer the victory, but resulted in a reversal and new trial on appeal. *See id.*

Unfortunately, it is hard to argue that below-the-belt tactics never work. True, they sometimes backfire, making their author look clumsy or leading the jury to conclude the client or lawyer cannot be trusted. Because preserving credibility at trial is all important, an accumulation of arguments that obviously lacks evidentiary support, or cross-examination plainly designed to smear the other side, can cause the jury to lose faith in the overzealous lawyer's story and sink the case. When exposed, discovery abuse or witness coaching can result in serious penalties, as in the Moussaoui sentencing. But fear of sanction or losing are not sufficient restraints when it comes to lawyering that mauls the truth. Most of the time, crossing the line goes undetected or unpunished, or is met in kind by the opposition, causing outcomes to turn on who can attack more expertly and on what Judge Jerome Frank once called the "preponderance of the perjury." Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 85 (1949).

In the end, the most effective restraint on lawyering designed solely to win without regard for the truth is simply the honor of lawyers. In the age of lawyer jokes and public approval ratings that hover below politicians, the phrase might sound oxymoronic to laypeople, but lawyers who want to win by fighting fair are the system's last, best hope. The Ninth Circuit recently made this point in denying a pharmaceutical company the right to inspect intake questionnaires completed by clients of a personal injury law firm, on the theory that the clients might have told their lawyers one thing during their initial interviews but might be testifying to something altogether different and more helpful in their depositions:

> It must be conceded that if a plaintiff says one thing to his lawyer, and says another at his deposition, keeping the first disclosure secret creates a risk to the honest and accurate resolution of the dispute. That risk is mitigated by the plaintiffs' lawyer's ethical duties of candor toward the tribunal and fairness to the opposing party and counsel. The privilege does not mean that the plaintiffs may lie about their symptoms, or that their lawyers may allow them to lie. A lawyer can be disbarred for offering evidence that the lawyer knows to be false, failing to disclose a material fact when disclosure is necessary to prevent a fraud by the client, or assisting a witness to testify falsely. Most lawyers' sense of honor would prevent them from doing these things even if they were not at risk of losing their licenses if they did. These restraints of honor and ethics, rather than court-ordered disclosure of confidential communications, are the means that our system uses to deal with the risk of clients saying one thing to their lawyers and another to opposing counsel, the judge, or the jury.

Barton v. District Court, 410 F.3d 1104, 1112 (9th Cir. 2005).

In 1940, Robert Jackson, then attorney general, addressed a conference of U.S. Attorneys on the attributes to be desired in federal prosecutors. "The qualities of a good prosecutor are as elusive and impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway." Robert H. Jackson, "The Federal Prosecutor," 24 *J. Am. Judicature Soc.* 18, 20 (1940). The same could be said of the private bar. Hopefully, most lawyers need not be told how to zealously represent clients while simultaneously upholding the truth.