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COMMENTARY

THE "LAW" ON LAWYER EFFORTS TO DISCREDIT TRUTHFUL TESTIMONY

CARL M. SELINGER*

[The advocate] 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

— Professional Responsibility: Report of the Joint [A.B.A.-A.A.L.S.] Conference, 44 A.B.A. J. 1159, 1161 (1958).

A lawyer shall not knowingly . . . make a false statement of material fact . . . to a tribunal. . . .

A lawyer shall not . . . unlawfully . . . destroy or conceal a document or other material having potential evidentiary value. . . .

It is professional misconduct for a lawyer to . . . engage in conduct involving . . . misrepresentation. . . .

— Model Rules of Professional Conduct, Rules 3.3(a)(1), 3.4(a), 8.4(c) (1983).

While many lawyers would refuse to do so, there is no legal rule prohibiting a lawyer from cross-examining a witness with respect to testimony that the lawyer knows to be truthful. In examining a witness, a lawyer may use customary forensic techniques, including harsh implied criticism of the witness' testimony, character or capacity for truth-telling.

— Restatement of the Law Governing Lawyers § 152 cmt. d. (Council Draft No. 9, 1992)

No, I don't really believe that a lawyer who attempted by cross-examination or impeachment of a witness to discredit testimony that he/she knew was truthful would be subject to professional discipline under Model Rules 3.3(a)(1), 3.4(a), or 8.4(c). Before a lawyer's professional livelihood is adversely affected, he/she is certainly entitled (perhaps constitutionally entitled) to more notice than that — especially when a great many lawyers think the practice in question is a quite acceptable part of the adversary system.¹ Nor do I think that the lawyer should fear

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1. This observation is based on the general tenor of the discussion of RESTATEMENT OF THE LAW GOVERNING LAWYERS § 152 cmt. d (Preliminary Draft No. 7, 1991), at the meeting of the American Law

discipline under Model Rule 4.4 for using "means that have no substantial purpose other than to embarrass . . . a third person . . ." Almost always, the lawyer *does* have another purpose: to win for his/her client.

That being said however, it seems to me quite a different thing for the proposed *Restatement of the Law Governing Lawyers* to conclude that a lawyer "may" cross-examine truthful witnesses, and is "entitled" to do so through "harsh implied criticism" of the witness' truthfulness, which is what the 1991 Preliminary Draft said,² or even to conclude as the 1992 Council Draft No. 9 does that "there is no legal rule prohibiting" such conduct.³ If the practice is profoundly at odds with what the disciplinary rules do say, if there is little legal authority of other kinds supporting it, if the single justification offered in bar association and judicial authority applies only to criminal cases, and if even that justification is not persuasive, I think that a restatement of the law governing lawyers should say so.

In this commentary, I want to discuss briefly the policy reasons for trying to prevent lawyers from using cross-examination or impeachment to discredit truthful testimony; the practicality of a prohibition that would apply only when a lawyer "knows" the truth; the arguments that have been advanced for allowing lawyers to discredit truthful testimony; the authority that has been relied upon in support of the proposition that discrediting truthful testimony is legally permissible; and the practical significance of having a professional prohibition against discrediting truthful testimony that could rarely, if ever, be enforced.

*Policy Reasons for Trying to Prevent Lawyers
From Discrediting Truthful Testimony*

The most thoughtful discussion of the ethics of trying to discredit truthful testimony can be found in the commentary following Standard 7.6 of the original 1971 version of the American Bar Association's Standards for the [Criminal] Defense Function. After consulting with "a number of leading American and British trial lawyers," the Advisory Committee concluded in Standard 7.6(b) that "[a lawyer] should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully."⁴

In support of this conclusion, the commentary stressed two policies. First, there is the policy against destroying truthful evidence, which is embodied today in Model Rule 3.4(a). The commentary reasoned that "[c]ross-examination and impeachment are legal tools which are a monopoly of licensed lawyers, given for the high purpose of exposing falsehood, not to destroy truth . . ."⁵ Second, there is the

Institute's Members Consultative Group, on September 13, 1991.

2. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 152 cmt. d. (Preliminary Draft No. 7, 1991).

3. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 152 cmt. d. (Council Draft No. 9, 1992) [hereinafter 1992 RESTATEMENT DRAFT].

4. STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION Compilation, at 270 (Approved Draft, 1971) [hereinafter 1971 STANDARDS].

5. *Id.* at 272.

policy against discouraging truthful witnesses from coming forward — a policy that came sharply to our attention during the recent confirmation hearings for Supreme Court Justice Clarence Thomas. "The policy of the law is to encourage witnesses to come forward and give evidence in litigation. If witnesses are subjected to needless humiliation when they testify, the existing human tendency to avoid 'becoming involved' will be increased."⁶

Further, with respect to the truth-finding function of judicial proceedings, I think it is difficult to avoid the conclusion that courtroom statements by lawyers implying that a witness's truthful assertions of fact are not truthful comprise a species of false statements of fact to a tribunal, which are condemned by Model Rule 3.3(a)(1). And the use of impeachment to suggest to a trier of fact that a truthful witness is not being truthful certainly seems to constitute "conduct involving . . . misrepresentation," which is prohibited by Model Rule 8.4(c). Reflecting later on an actual case in which he might as defense counsel have attempted by cross-examination and impeachment to discredit the testimony of a truthful rape victim, Harry Subin has written,

I was prepared to stand before the jury posing as an officer of the court in search of the truth, while trying to fool the jurors into believing a wholly fabricated story, i.e., that the woman had consented, when in fact she had been forced at gunpoint to have sex with the defendant.⁷

When Would a Lawyer "Know" That a Witness is Telling the Truth?

Usually, the way that a lawyer would know that a witness is testifying truthfully — and the way that Subin knew — would be the same way that a lawyer would know that his/her client intended to testify or had already testified falsely, i.e., perjuriously: The benchmark for judging whether the testimony in question is truthful would be what the lawyer's own client had told him/her. As the commentary to the original version of Defense Standard 7.6 observed, "A prosecution witness . . . may testify in a manner which confirms precisely what the defense lawyer has learned from his own client and has substantiated by investigation."⁸

Are self-incriminatory factual statements by clients to their lawyers always truthful? Certainly not. But in the situations in which the discrediting issue comes up, we are not dealing with defendants who may be motivated to lie by a desire to be punished — in order to protect someone else, get attention, or just respond to pressure. We are dealing instead with defendants who want to get off, and it's difficult indeed to understand why *they* would want to falsely incriminate themselves. Of course, one can always come up with far-fetched hypotheticals in which truly innocent defendants are mistaken factually about their own guilt. Monroe Freedman imagines, for example, a defendant who knows "that he pulled

6. *Id.* at 273.

7. Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 135 (1987).

8. 1971 STANDARDS, *supra* note 4, at 272.

the trigger and that the victim was killed, but not that his gun was loaded with blanks and that the fatal shot was fired from across the street."⁹ But even Freedman apparently would not have us tailor our day-to-day rules of professional responsibility to fit such hypotheticals.¹⁰

Indeed, I would be prepared to argue that respect for a client's autonomy requires that statements by a client to a lawyer that the client insists are true should almost always be taken as controlling in terms of the lawyer's professional responsibilities. And that proposition cuts both ways.

I am very disturbed by the possible implications of the provision in Model Rule 3.3(c) that "[a] lawyer may refuse to offer evidence that the lawyer reasonably believes is false." What kind of Kafkaesque world would it be in which an honest client might have to persuade a lawyer that his/her story is not implausible, on pain of not getting legal assistance in telling it in court? Could a lawyer just not inform a client about a witness with testimony favorable to the client, and consistent with the client's story, when the lawyer "reasonably believes [the testimony] is false"? But just as a client should be entitled to expect that his/her lawyer will act on the basis of what the client says is true, a client should have to accept that his/her statements will also limit what a lawyer can do.

Policy Arguments in Favor of Allowing Lawyers to Discredit Truthful Testimony

One argument in favor of permitting the discrediting practice that is applicable to civil as well as criminal cases is an argument based on the principle of confidentiality. Thus, Monroe Freedman says that

the 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. When a lawyer fails to cross-examine only because his client, placing confidence in the lawyer, has been candid with him, the basis for such confidence and candor collapses. Our legal system cannot tolerate such a result.¹¹

But what about a lawyer disclosing a client's perjury when the lawyer knows it's perjury because of the client's previous candid statements to the lawyer? Freedman is consistent: no disclosure of client perjury.¹² The Model Rules, however, require disclosure.¹³ And once a lawyer has to tell a client, "If you tell me that something

9. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1472 (1966).

10. *Id.*; see also Carl M. Selinger, *Criminal Lawyers' Truth: A Dialogue on Putting the Prosecution to Its Proof on Behalf of Admittedly Guilty Clients*, 3 J. LEGAL PROF. 57, 67-68 (1978).

11. Freedman, *supra* note 9, at 1474-75.

12. *Id.* at 1477-78.

13. Model Rule 3.3(a)(4) states in part: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(e)(4) (1983). The ABA Committee on Ethics and Professional Responsibility has concluded that the rule requires disclosure to the court. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 37-353 (1987).

is the truth, I can't let you testify that it isn't true, and will have to tell the judge if you do so," it's hard to imagine that a significant further incentive to dissemble would be provided by adding, "and I can't pretend that it isn't true when I'm questioning other witnesses either."¹⁴

Another argument that could apply in both criminal and civil cases is an argument that because discrediting truthful testimony may sometimes be the only way to obtain an accurate determination of the ultimate facts of a case from the trier of fact, there should be no rule against discrediting truthful testimony. In fact, a generation of law students has been raised on Monroe Freedman's hypothetical of a robbery defendant who "has been *wrongly* identified as the criminal, but correctly identified by [a] nervous, elderly woman [witness] who wears eyeglasses, as having been only a block away five minutes before the crime took place."¹⁵

I have previously written at length about the innocent defendant argument,¹⁶ and will not repeat that discussion here. Suffice it to say that that argument might also be relied on to permit the subornation, or at least nondisclosure, of perjury, which might sometimes be necessary to counteract other truthful but misleading testimony; and it could even be used to sanction the destruction of physical evidence, which might sometimes tend to create a false impression. If it is clear to us that there should be rules against such practices, which lawyers would have to disobey if they felt sufficiently strongly about the justice of their clients' causes,¹⁷ why wouldn't we also want to have a rule against discrediting truthful testimony?

A final argument for allowing the discrediting practice would apply only to the defense of criminal cases. The argument would be that discrediting truthful testimony 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

14. Even apart from the perjury exception to confidentiality, Subin has concluded that given the other exceptions, "No client could be confident — particularly when the information is of a suspect nature — as to what could safely be revealed." Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1165 (1985). On the other hand, Andrew Kaufman observed in 1981 that the exceptions were "still relatively confined and still relatively easy to explain." Andrew L. Kaufman, Book Review, 94 HARV. L. REV. 1504, 1512 n.20 (1981).

15. MONROE H. FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM* 48 (1975) (emphasis added); see also Freedman, *supra* note 9, at 1474.

16. Carl M. Selinger, *The Perry Mason Perspective and Others: A Critique of Reductionist Thinking About the Ethics of Untruthful Practices by Lawyers for "Innocent" Defendants*, 6 HOFSTRA L. REV. 631 (1978).

17. See *id.* at 660-62. Delaware Bar Association Professional Ethics Committee Op. 1988-2 provides, I believe, the first official recognition, as it were, of civil disobedience by lawyers:

[T]he lawyer's duty is non-disclosure [of information that his client has AIDS to a woman with whom he is living]. If the lawyer's moral code is such that he cannot abide by this duty, he may be pressed to the point of civil disobedience because obeying the letter of the law may require him to sacrifice more of his principles than he can bear. If so, the lawyer should inform his client of the decision to disclose and then be prepared to accept discipline if he cannot convince the disciplinary authorities to read a "moral compulsion" exception to the letter of Rule 1.6.

5 Laws. Man. on Prof. Conduct (ABA/BNA) 203 (1989).

clearly permitted to do, under Model Rule 3.1, even on behalf of an admittedly guilty client. While I have questioned elsewhere the supposed justifications for such permission,¹⁸ I do not believe that it is necessary to repudiate it in order to condemn the discrediting practice. Again, Harry Subin explains the differences well:

In the [discrediting] situation . . . the prosecution has presented the strongest case possible, i.e. the truthful testimony of the victim of a crime. In any case, 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. Finally, as a proponent of this "screening theory" concedes, there may be a danger that if the prosecutor sees that the truth alone is inadequate, he or she may be inspired to embellish it. That, of course, is not likely to make the screening mechanism work better.¹⁹

The Authorities Saying that Discrediting Truthful Testimony is Permissible

For the proposition that the law permits lawyers to try to discredit truthful testimony, the *Restatement's* reporters rely mainly²⁰ on the later, 1979, version of the A.B.A.'s Standards for the [Criminal] Defense Function,²¹ and on dicta-like language from the dissenting and concurring opinion of Justice White, writing for only two other justices, in the 1967 case of *United States v. Wade*.²² In the 1979 version, Standard 4-7.6(b) said that, "A lawyer's belief or knowledge that the witness is telling the truth does not preclude cross-examination, but should, if possible," it added, "be taken into consideration by counsel in conducting the cross-examination." The still-newer 1992 version of the Standards just leaves off the addition.²³

The commentary to the 1979 version talked only about criminal cases; and it said that a lawyer would be free to *refrain* from cross-examining or impeaching a truthful witness only if refraining would not prevent the lawyer from offering an effective defense — and "where the defendant has admitted guilt to the lawyer and does not plan to testify, and the lawyer simply intends to put the state to its proof and raise a reasonable doubt, skillful cross-examination of the prosecution's witnesses is essential."²⁴ Similarly, Justice White's opinion in the *Wade* case, treats discrediting truthful testimony as a means of putting the prosecution to its proof:

[A]bsent a voluntary plea of guilty, we . . . insist that [defense counsel] defend his client whether he is innocent or guilty Our interest in

18. Selinger, *supra* note 10.

19. Subin, *supra* note 7, at 148-49 (footnote omitted).

20. 1992 RESTATEMENT DRAFT, *supra* note 3, § 152 cmt. d reporter's note.

21. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (2d ed. 1979) [hereinafter 1979 STANDARDS].

22. 388 U.S. 218, 250 (1967).

23. STANDARDS FOR CRIMINAL JUSTICE Standard 4-7.6(b) (3d ed. 1992).

24. 1979 STANDARDS, *supra* note 21, at commentary to Standard 4-7.6(b).

not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, *regardless* of what he thinks or knows to be *the truth*. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth²⁵

Justice White is less than clear whether the discrediting practice he is talking about is required or discretionary. But two things are clear with respect to the authorities relied upon by the reporters, including also the three cited scholarly commentaries: they all talk only about criminal cases; and all, save Monroe Freedman, rest their cases on the "put the prosecution to its proof" argument, which Model Rule 3.1 makes clear has no applicability outside the defense of criminal cases, and amounts in civil cases to the unethical taking of a "frivolous" position. And as for the merits of using the "put the prosecution to its proof" argument to justify discrediting truthful testimony, what is it exactly that's *wrong* with a prosecution case whose only weakness is that its truthful witnesses can be made to look bad by skillful defense counsel?

*What Good Would It Do to Prohibit Discrediting,
Much Less Say That the Law Implicitly Condemns It?*

Even if a very specific prohibition on discrediting truthful testimony were to be written into the Model Rules, it would be almost impossible to prove in any particular case that a lawyer *knew* that the testimony in question was truthful. This proof problem, coupled with the fact that a great many lawyers think that discrediting is acceptable, might make it appear rather pointless for the *Restatement's* reporters to say that existing law implicitly condemns the practice, at least outside of the representation of criminal defendants. But I believe it might do some good.

First, although the reporters have now made it reasonably clear in their 1992 Council Draft that lawyers do have discretion to refrain from trying to discredit truthful testimony, many lawyers might assume from the language presently in the draft that the practice is consistent nevertheless with the existing rules governing trial advocacy — and that discretion is being granted to lawyers simply as a concession to their personal squeamishness, or desire to be nice. The Code of Professional Responsibility stated, for example, that lawyers do not show insufficient zealotry on behalf of their clients merely "by treating with courtesy and consideration all persons involved in the legal process";²⁶ and we are living after all at a time when it is fashionable to denounce "Rambo" litigation tactics, and adopt lawyer "codes of civility."

But what's wrong with discrediting is not just that it's not nice: it also confounds the premises of the adversary system, and especially our contemporary system —

25. *Wade*, 388 U.S. at 257-58 (footnote omitted).

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1969).

in which lawyers in the federal courts will probably soon be required to come forward voluntarily (or at least without a discovery request) with certain kinds of unfavorable truthful evidence, even if they learned about it in confidence from their clients.²⁷ Perhaps if the ALI says that discrediting is illegitimate, more lawyers will exercise their discretion not to engage in the practice, and in the process more thoughtful laypeople will come to have fewer doubts about the adversary system as an instrument of justice.

Second, saying that the law implicitly condemns discrediting would help to make clearer the applicability to borderline situations of the prohibition in Model Rule 3.4(b) against assisting a client or other witnesses in committing perjury. Lawyers know already that they cannot advise a client to lie, or put a client on the stand who by changing his/her story has implicitly conceded that he/she is going to lie. But there is still the more subtle practice of preempting any such conflicts by telling the client about the applicable law before the lawyer asks the client to tell his/her story, so that the client learns in advance what it would be beneficial for him/her to say.²⁸ That practice, like discrediting, seems to depend for its claim to acceptability on a notion that the *appearance* of a witness' testimony, as far as truth or falsity is concerned, is as important, or more important, than the reality. The sooner we make clear that that approach to testimony is intolerable, the better.

Third, even if the reporters were noncommittal about discrediting truthful testimony in criminal cases, declaring it off-limits in civil cases would help to underline the proposition embodied in Model Rule 3.1, and Rule 11 of the Federal Rules of Civil Procedure, that putting an opponent to his/her proof has no place in civil litigation. Even as late as the debates on the Model Rules, arguments were made that civil defendants should have the same right as criminal defendants to put their opponents to their proof;²⁹ and CLE speakers from the personal injury defense bar still sometimes seem to say that they have such a right. The discussion of discrediting in the *Restatement* could make clear that as the only rationale in support of the practice in bar association and judicial authority is one that applies only to criminal cases, there is little basis for finding it acceptable outside of that context.

Fourth, and finally, condemning the discrediting of truthful testimony even in criminal cases could help to set the criminal justice system on a new course that would be more conducive to the rehabilitation of offenders. Monroe Freedman has urged that we have a "purpose as a society . . . to respect the humanity of the guilty defendant,"³⁰ and I couldn't agree more. But what in the world is truly respectful about going along with a client's desire that you actively mislead other people, and still worse, verbally mug an innocent witness? As Edwin Greenebaum has observed:

People with legal problems frequently have troubles, in part, because they have difficulty in their relationships with others. Lawyering has

27. See Randall Samborn, *Rules Changes Go to Congress*, NAT'L L.J., May 3, 1993, at 3, 42.

28. See generally MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 143-60 (1990).

29. See Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 20 (1991).

30. FREEDMAN, *supra* note 28, at 17.

therapeutic implications even when the lawyer is not a therapist. To adopt a phrase, the attorney is either a part of the solution or a part of the problem [T]roubled individuals frequently view their world as one where people exist principally to use each other and do not have constructive, mutual relationships. The attorney who acquiesces in being only a tool of such a client may be reinforcing those perceptions and behaviors which tend to involve the client in difficult situations.³¹

Thus, it may be very important for offenders, and especially for young offenders, to see in the courtroom, and become a part of, even involuntarily, a different world that operates according to a different and more humane set of values.

31. Edwin H. Greenebaum, *Attorneys' Problems in Making Ethical Decisions*, 52 IND. L.J. 627, 635 (1977). It is not too difficult to imagine the reaction of a defendant who has finally revealed the incriminatory truth to his/her lawyer, and is told by the lawyer, "I didn't hear you say that." See FREEDMAN, *supra* note 28, at 130 n.85 (stating that Roy Cohn once proposed this tactic).

I have discussed elsewhere the question whether a defendant who found that his/her lawyer could not engage in one or another untruthful practice on his/her behalf could justly complain of being penalized not for telling a falsehood, but rather for having for once told the truth, to the lawyer. My conclusion was that except perhaps in the case of simply putting the prosecution to its proof, such a claim was not persuasive. Selinger, *supra* note 10, at 104-06.

