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Adversary Ethics: More Dirty Tricks

RICHARD H. UNDERWOOD*

I. Introduction

While much of the academic debate over the excesses of the adversary system is a simple reflection of the belated integration of "legal ethics" into law school curricula,[1] there is a growing concern that certain "wide spread [trial] practices are in need of change."[2] Perhaps the most extreme criticism of the prevailing ethic, whether that prevailing ethic is real or imagined, can be found in the works of Jeffrey O'Connell,[3] who urges us to abandon a system of dispute resolution "fraught with a frightening mixture of archaic technology, raw emotionalism, and sly tricks."[4]

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1. The traditional academic indifference toward "legal ethics" as a separate course offering is noted in M. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION vii (1979), and Hegland, *Moral Dilemmas in Teaching Trial Advocacy,* J. LEGAL ED. 69, 86 n.28 (1982).

2. M. FRANKEL, PARTISAN JUSTICE 79 (1980). Among the "wide-spread practices" cited by Judge Frankel are:

> . . . knowingly presenting false testimony of clients or witnesses; trying by artful cross-examination or other techniques to block the truth, or to make what is known to be true seem false; and deliberately failing to reveal evidence that would help the court or jury to achieve an accurate understanding of the facts.

A more complete list of deceptive practices is set forth in Ordover, *The Lawyer as Liar,* 2 AM. J. TRIAL ADVOC. 305, 314 (1979):

> . . . deliberately rais[ing] an objection simply to interfere with his adversary's flow in opening or summation or to interrupt the witness solely for the sake of interruption . . . . Dropping books and paraphernalia on the floor to distract the jury during opposing counsel's summation, influencing jurors with unsubtle remarks or gestures in the hallway during recess, positioning exhibits not in evidence so that jurors will see them, quoting out of context or purposely misciting cases, and even worse, omitting important authorities from briefs and arguments . . . . [T]he intentionally misleading question tendered on cross-examination; the question asked, not in good faith, but merely to have the jury hear the question . . . ; and the attempt to coach the witness while he is on the stand.

3. *See, e.g.,* J. O'CONNELL, THE LAWSUIT LOTTERY (1979); J. O'CONNELL, ENDING INSULT TO INJURY (1975).

4. J. O'CONNELL, ENDING INSULT TO INJURY 7 (1975).

While it is safe to assume that few would fully endorse all of Professor O'Connell's criticisms, or share completely his enthusiasm for major changes in our system of dispute resolution, a handful of commentators have joined him in identifying and condemning certain "dirty tricks."[5] Unfortunately, only the more theatrical forms of cheating tend to be catalogued. Moreover, the remedy suggested to the party aggrieved by questionable trial tactics is more often than not "a well directed crotch kick in retaliation."[6]

One of my purposes in writing this article is to provide a primer on the more common forms of cheating employed by trial lawyers. Another purpose is to suggest that there are antidotes that may be administered to curb these abuses,[7] assuming that trial attorneys are alert enough to invoke them, and trial judges are willing to apply them.[8]

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5. *See, e.g.,* McElhaney, *Dealing with Dirty Tricks* 7 LITIGATION 45 (1981). At least one law school "skills program" has incorporated materials on "dirty tricks" to "prepare the fledgling lawyers to deal with [them]." *See* Ordover, *Why 'Dirty Tricks' Are Taught at Emory,* NAT'L L.J. June 14, 1982, at 14.

6. J. JEANS, TRIAL ADVOCACY 27 (1975). A more diplomatic, but nonetheless effective countermeasure for garden variety distractions has been suggested by Steve Goldberg of the University of Minnesota: "Your honor, may we pause for a few moments until (Mr.) ____ can stop being rude?"

7. Unfortunately, the view seems to be that "dirty tricks" pay due to an absence of meaningful remedies for the aggrieved party. From the viewpoint of the plaintiff's lawyer, O'Connell opines in THE LAWSUIT LOTTERY, *supra* note 3, at 40, that:

> It is true that [in the cases discussed] the illicit conduct of the lawyers resulted in a reversal of the trial court's decision in his favor. But to the extent that the trickery helped gain a verdict in the first place — with the realization that it might or might not be appealed and with the certainty that any verdict can be used as a lever in bargaining over settlement pending appeal — a lawyer could well conclude that such tricks are worth a try.

Compare Jeans, *supra* note 6:

> When such a transgression occurs by the plaintiff in a civil case or a prosecutor in a criminal matter, the opponent may seek appropriate relief from the trial court. But if the defense attorney has injected the poison there is little, if any, antidote available. Mistrials are, from a practical point of view, undesirable (who wants to abort a year of docket waiting, and the expense of an unfinished trial?) and that admonition to disregard the testimony is meaningless.

8. The primary duty of the court to correct unprofessional conduct has been forcefully advocated in another context by Professor Freedman in LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 101-02 (1975).

II. Some Preliminaries

Ask any trial attorney to prepare a list of unethical practices and he will most likely recite incidents in which an opponent injected, or attempted to inject, inadmissible evidence during direct or cross-examination of a witness. Any proper survey of unethical trial practices, however, must begin with counsel's preparation for trial.[9]

A. The Deceptive Trial Brief

It has become common practice for trial counsel in civil cases to present some form of law brief or trial memorandum to the court, ostensibly to "simplify the litigation and to reduce substantially the time that a busy judge must take in understanding the case."[10] The trial brief also serves as an opening statement, intended "to persuade the court to shape the record favorably to the party on whose behalf the brief is submitted."[11] The opportunity to "run one by" in this initial presentation to the court, by distorting fact or law, is widely recognized.[12] The disciplinary rules of the Code of Professional Responsibility which directly address such deliberate deceptions provide in part:

> DR 7-106 Trial Conduct.
> (B) In presenting a matter to a tribunal, a lawyer shall disclose:
> (1) Legal authority in the controlling jurisdiction known to him to

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9. For a discussion of abuses in pleading, discovery, and motion practice, *see* Underwood, *Dealing with the "Court Crunch": Judicial Control of Adversary Ethics - The Model Rules of Professional Conduct and Proposed Amendments to the Federal Rules of Civil Procedure,* 56 ST. JOHN'S L. REV. 625 (1982).

10. R. FIGG, R. MCCULLOUGH, and J. UNDERWOOD, CIVIL TRIAL MANUAL 384 (1974) [Hereinafter cited as FIGG.] *See also* M. PITTONI, BRIEF WRITING AND ARGUMENTATION 4 (3d ed. 1967). The significance of the trial brief in today's litigation process is noted in Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 709 (7th Cir. 1979).

11. Schumate, *The Trial Brief,* 5 AM. JUR. TRIALS § 2 at 89, 91 (1966). The trial brief may also provide a vehicle for persuading the court to preclude opposing counsel from pursuing improper lines of questioning or argument. *Id.* at 103 n.1.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110(B) (1979) requires service of the trial brief on opposing counsel, unless local practice or a local rule provides for *ex parte* submissions. *Accord,* H. DRINKER, LEGAL ETHICS 78 (1953); CODE OF TRIAL CONDUCT ¶ 19(b)(2) (American College of Trial Lawyers 1972). However, counsel often ignore this rule and not all commentators perceive the applicability of the Code provision. *Compare* Schumate, *supra,* at 92-3; PITTONI, *supra* note 10, at 4-5.

12. *See* Ordover, *supra* note 2, at 314; Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice,* J. LEG. PROF. 107, 111 (1978).

> be directly adverse to the position of his client and which is not disclosed by opposing counsel.
>
> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.[13]

Notwithstanding these comparatively unambiguous standards, a number of appellate decisions have reported gross violations of the Code including; statements of purported fact unsupported or contradicted by the record,[14] distorted quotations,[15] or deliberate omissions of controlling authority.[16] Without question, similar deception also takes place at the trial level, in both civil and criminal cases. In fact, misconduct in connection with submissions to the trial court often take extreme forms.[17] For example, in *Garcia v. Silverman*[18], counsel submitted by motion an order for the court's signature directing one of the parties, as well as the City of New York (a non-party), to show cause why the City should not be joined and stayed from enforcing certain administrative orders pending determination of counsel's motion. Counsel omitted from his papers the fact that similar relief had already been denied in the same matter by another court after a full trial of the issues. The court published an opinion denying the relief requested and "as a warning to all members of the bar" announced:

> Henceforth, any attorney who submits papers to this court which deliberately fail to state what prior proceedings have taken place and deliberately withhold information to inveigle the court into making a decision it should not make, will be held in contempt of court and the papers together with all pertinent facts will be submitted to the Grievance Committee of the Association of the Bar of the City of New York for appropriate actions.[19]

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13. *See also* A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3(a) and 3.4(e)(1982).

14. *In re* Mascolo, 505 F.2d 274, 278 (5th Cir. 1974).

15. Quality Molding Co. v. American Nat'l Fire Ins. Co., 287 F.2d 313, 316 (7th Cir. 1961). *Compare* County of Maricopa v. Maberry, 555 F.2d 207, 222 (9th Cir. 1977).

16. United States v. Burnette-Carter Co., 575 F.2d 587, 589 n.4 (1978).

17. *See, e.g.,* Pizarro v. Luther, 520 F. Supp. 195 (N.D. Ill. 1981); Garcia v. Silverman, 70 Misc. 2d 537, 334 N.Y.S.2d 474 (1972);

18. 70 Misc. 2d 537, 334 N.Y.S. 2d 474 (1972).

19. *Id.* at____, 334 N.Y.S. 2d at 476.

In this area, at least, it appears that trial judges will not shrink from imposing sanctions on errant attorneys once misconduct is brought to their attention. It is hardly a foregone conclusion, however, that counsel's deception will be discovered in the absence of mandatory service of trial briefs on all other parties to a litigation,[20] and local rules requiring that practice would provide some measure of relief in these instances.

B. The Coached Witness

Discussions of "woodshedding" witnesses tend to conjure up horror stories, such as that revealed by Max Steuer's cross-examination in the Triangle Shirt Waist Company Case. According to Irving Younger's engaging account, the prosecutor in that case "phoneyed up" the evidence, and turned his witnesses into "human tape recorders" capable of parroting their narrative testimony over and over again without the slightest degree of variation.[21] Unfortunately, there is no bright line between refreshing the recollection of a witness and suborning perjury.[22]

Regarding this concern the Code of Professional Responsibility, DR 7-102(A)(4) and (6) provides:

> (A)In his representation of a client, a lawyer shall not:
>
> . . .
>
> (4) Knowingly use perjured testimony or false evidence
>
> . . . .
>
> (6) Participate in the creation or presentation of evidence when he knows or it is obvious that the evidence is false.

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20. In Photovest v. Fotomat Corp., 606 F.2d at 710-11, the Court observed:

> [W]e are of the opinion that exchange of trial briefs at the time they are filed with the court is sounder procedure, being one more consistent with the elimination of gamesmanship aspects of litigation and, indeed, with the quest for truth, presumably the ultimate aim of adversarial litigation . . . . The district court judge, particularly in the case of a long and complex trial, who has entertained incorrect concepts about some aspects of the case during the course of the trial because of an *ex parte* brief, is placed in the difficult position of returning to a *status quo ante* position prior to engaging in the decisional process.

The Court made no reference to DR 7-110(B), although the Court took pains to point out that counsel who presented his brief to the trial judge but not to his opponent did not appear to have been attempting to secure an unfair advantage. *Id.* at 708.

21. Proceedings at the ABA Annual Meeting in Montreal, Canada on August 12, 1975, *reprinted in* ABA SECTION OF LITIGATION MONOGRAPH NO. 1, *The Art of Cross-Examination* (1976).

22. Professor Freedman suggests that the problem is one of the most difficult in the field of legal ethics, at least when the witness is also the lawyer's client. M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 59 (1975).

Under these standards the responsibility for preventing false testimony rests upon trial counsel, who, in civil cases at least, may call only those witnesses whom he believes are truthful.[23] On the other hand, trial manuals are full of tips on how to "enlist [the third party witness'] active and partisan support of your case."[24]

As Freedman notes, the risk of suborning perjury that arises during witness preparation is sidestepped by the British Barrister, who ordinarily takes no part in the preparation of witnesses for trial. *Id.* at 109. Sir William Boulton's CONDUCT AND ETIQUETTE AT THE BAR (6th ed. 1975), the more or less official authority for barristers, provides that:

> It is a recognized practice that witnesses (other than the parties and experts or professional witnesses who are instructing counsel), should not be present at consultations or conferences with counsel and that counsel should not interview such witnesses before or during a trial.

I deal here solely with the problem of the coached witness, and will not address the problem of counsel's presentation of, or argument dependent on, perjured testimony in criminal cases. On that issue see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: THE DEFENSE FUNCTION 4-7.7 (1979); Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26 (1975); Ordover, *supra* note 2; and Wolfram, *Client Perjury*, 50 SO. CAL. L. REV. 809 (1977). In State v. McCormick, 298 N.C. 788, ____, 259 S.E.2d 880, 882 (1979) the court noted:

> It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer . . . and is to be commended because it provides a more efficient administration of justice and saves court time . . . . Nothing improper has occurred so long as the attorney is preparing the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth and not false or perjured testimony . . . . The sanctions of the Code of Professional Responsibility are there for the attorney who goes beyond preparing a witness to testify to that about which the witness has knowledge and instead procures false or perjured testimony.

Compare, R. KEETON, TRIAL TACTICS AND METHODS § 2.14 (2d ed. 1973).

23. *In re* Schapiro, 144 A.D. 1, ____, 128 N.Y.S. 852, 858 (1911). *See also In re* A., 276 Or. 225, 554 P.2d 479 (1976) (counsel may not sit silently while a client testifies incompletely in response to questions asked by opposing counsel). On the ethical obligations of the criminal defense with regard to non-client perjury, *see* People v. Schultheis, ____ Colo. ____, 638 P.2d 8 (1981); State v. Lloyd, 48 Md. App. 535, 429 A.2d 244 (1981); *See also* Model Rule 3.4(a) and (b).

24. R. SIMMONS, WINNING BEFORE TRIAL: HOW TO PREPARE CASES FOR THE BEST SETTLEMENT OR TRIAL RESULT 205 (1974). Simmons recommends, among other things, that the witness be educated on the merits of the client's case, on what the witness may do to overcome expected opposition, and that he be "oriented" by counsel's emphasizing of facts that will help the case and subor-

Given such ambiguous advice, to what extent will counsel simply choose to employ the "lecture," or the technique of suggesting, if not outlining, a favorable line of testimony to the interviewee at the outset, and then steering the witness' responses into a favorable script.[25]

While it may be assumed that improper coaching of witnesses is a common phenomenon,[26] opposing counsel can expect little, if any, aid from the trial judge.[27] In a recent North Carolina case,[28] the trial judge was rebuked for refusing to allow a witness, who the court believed had been coached, to testify on the reputation of another for truth and veracity. The appellate court opined:

> When a witness' testimony appears to have been memorized or rehearsed or it appears that the witness has testified using the attorney's words rather than his own or has been improperly coached, then there are matters to be explored on cross-examination, and the weight to be given the witness' testimony is for the jury.[29]

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dinating (not suppressing) damaging facts. *Id.* at 205-6. *Compare* Uviller, *The Advocate, the Truth and Judicial Hackles*, 123 U. PA. L. REV. 1067, 1080-81 (1975), who proposes that the disciplinary rules be amended to provide:

> It is unprofessional conduct for a lawyer to counsel or countenance testimony by a witness in his favor which, although true in the part stated, omits matters which if stated might reasonably alter the meaning or significance of the testimony.

25. The most widely cited example of the "Lecture" may be found in R. TRAVER, ANATOMY OF A MURDER 35 (1958):

> The lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical and bad, very bad. Hence the lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. "Who, me? I didn't tell him to say," the lawyer can later comfort himself. "I merely explained the law, see." It is a good practice to scowl and shrug here and add virtuously: "That's my duty, isn't it?"

See also JEANS, *supra* note 6, at 16-19; MAGUIRE, WEINSTEIN, CHADBOURN & MANSFIELDS, CASES AND MATERIALS ON EVIDENCE 276-77 (6th ed. 1973).

26. FRANKEL, *supra* note 2.

27. *See* 3 WIGMORE ON EVIDENCE § 788 (Chadbourne rev. 1970):

> [The right to prepare witnesses] may be abused, and often is, but to prevent abuse by any definite rule seems impracticable. It would seem, therefore, that nothing short of an actual fraudulent conference could properly be taken notice of; there is no specific rule of behavior capable of being substituted for the proof of such facts.

28. State v. McCormick, 298 N.C. 788, 259 S.E. 2d 880 (1979).

29. *Id.* at ____, 259 S.E. 2d at 882-3. *Accord* Hanndi & Ibrahim Mango Co. v. Fire Ass'n of Philadelphia, 20 F.R.D. 181 (S.D.N.Y. 1957) (denying motion to suppress deposition). *Compare* Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330,

Thus, it may very well be that the only protection against the "coached" witness is self-help in the form of a carefully planned cross-examination.[30]

C. The Last Minute Continuance

Needless delay of litigation is hardly a new phenomenon[31] nor is it susceptible to a tidy discussion. Accordingly, the present

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47 L. Ed. 2d 592. (1976), reversing a conviction in a case in which the trial judge had ordered every witness whose testimony was interpreted not to discuss the case with anyone during recessess. In holding that such sequestration, when applied to the defendant, violated his Sixth Amendment right to counsel, the Chief Justice wrote:

> There are other ways to deal with the problem of possible improper influence on testimony or "coaching" of a witness short of putting a barrier between client and counsel for so long a period as 17 hours. The opposing counsel in the adversary system is not without weapons to cope with "coached" witnesses. A prosecutor may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination. In addition the trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct and cross-examination of a witness will be completed without interruption. That this would not be feasible in some cases due to the length of direct and cross-examination does not alter the availability, in most cases, of a solution that does not cut off communication for so long a period as presented by this record. Inconvenience to the parties, witnesses, counsel, and court personnel may occasionally result if a luncheon or other recess is postponed or if a court continues in session several hours beyond the normal adjournment hour. In this day of crowded dockets, courts must frequently sit through and beyond normal recess; convenience occasionally must yield to concern for the integrity of the trial itself.

See also Shedlock v. Marshall, 186 Md. 218, 46 A.2d 349 (1946) (cross-examination of witness who conversed during recess with counsel).

30. Many lawyers opine that the coached witness may be unmasked by well-placed inquiries regarding the number of consultations the witness had with others prior to trial. *See, e.g.,* J. BAER & J. BALICER, CROSS-EXAMINATION AND SUMMATION 97 (1948); L. SCHWARTZ, CROSS-EXAMINATION IN PERSONAL INJURY ACTIONS 42 (1933). *Compare* People v. McQuirk, 106 Ill. App. 2d 266, 245 N.E.2d 917 (1969) (skillful but unavailing cross-examination of prosecutrix in rape case). Thoughtful guidance on cross-examination of the coached witness is presented in KEETON, *supra* note 22, at 136-38.

31. C. DICKENS, BLEAK HOUSE 7 (DeVries ed. 1971):

> The little plaintiff or defendant who was promised a new rocking-

discussion is limited to delay at the eleventh hour.[32] As several commentators have pointed out, it is not always clear what lies behind counsel's decision to delay, or whether delay is in the client's interest or solely the attorney's interest[33]

> It is sometimes stated that . . . the lawyer representing the defendant should take every opportunity to have the case continued or to delay its final disposition in any other way . . . . [But] it does not follow that the temporary delay that can actually be obtained will benefit the defendant . . . . Delays in litigation usually result in greater expense of trial to both parties, and the necessity for each lawyer's devoting substantially more time to the case. This is particularly true when the continuance is obtained so near the trial that each lawyer has necessarily done a part of the final trial preparation.[34]

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horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of chancellors has come in and gone out . . .; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Channery-Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court perennially hopeless.

32. For a discussion of delay in connection with discovery and motion practice, *see* FIGG, *supra* note 10.

33. *See* Miller, *A Program for the Elimination of the Hardships of Litigation Delay*, 27 OHIO ST. L.J. 402, 409 (1966); Ordover, *supra* note 2, at 309-10. Zeisel, *Delay by the Parties and Delay by the Courts*, 15 J. LEGAL ED. 27, 29 (1962), suggests that:

> . . . counsel may not answer a call out of sheer negligence, but it may also be an intentional move in the interest of his client because, for instance, the evidence is not fully ready for trial, or because counsel may prefer that settlement negotiations be continued. But even if counsel should have so many cases on hand that he is forced to postpone some, such delay might well be construed to be in the interest of his client if the client prefers a delayed trial with this particular counsel to an earlier trial with a counsel who would be less busy but also less desirable. Thus, the study does not always permit us to distinguish betwen delay that is in the client's interest, delay that is in the counsel's interest, delay that is caused by the counsel's courtesy to opposing counsel, and delay that is simply due to negligence.

34. KEETON, *supra* note 22, at 432-33. *Compare,* Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968) (counsel reprimanded for numerous postponements of and last minute effort to seek a stay of new trial). On delaying tactics by the defense in criminal cases *see* State v. Hansen, 215 N.W.2d 249, 250 (Iowa 1974):

> [W]e cannot overlook the conduct of defense counsel, which deserves our strongest censure as being diliatory, obstructive, and harassing.
>
> Altogether the record shows some 135 filings in the case, almost 100 of them before trial. Many are routine but far too many are peti-

The Code provides some guidance on the problem of delay:

> DR 7-102(19) In his representation of a client, a lawyer shall not:
> (1) . . . delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.[35]

Notwithstanding the jurisdiction of the trial judges to enforce this provision by reason of their regulatory power over members of the bar practicing before them,[36] judicial control of diliatory continuances has been less than encouraging. A fairly recent example is provided by a Louisiana case, *Schulingkamp v. Noonan*.[37] In that case a notice of settling was sent to plaintiff's counsel three and a half months prior to the trial date, after counsel had failed to attend a pretrial conference. Counsel had not communicated with the client or obtained medical evidence from her physicians as late as twelve days before trial, and sought a continuance at the very last minute. The trial judge denied the continuance. Opining that the mishandling of the case was not attributable to the client, the appellate court ordered the respondent

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> tions, applications, motions—endlessly repeated—and frequently without any semblance of merit. At the same time counsel was trumpeting for a speedy trial and claiming denial of constitutional rights because the case was so long delayed. We agree with the trial judge—one of six who became the object of defendant's carping during the course of the case—who said defendant was using delay and hindrance as a ploy to set up a basis for appeal . . . .
> . . .
> . . . Lawyers are officers of the court, too, and actions which can most charitably be described as pettifoggery have no place in the representation of a client.

See ABA Project on Standards for Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* (Approved Draft 1971).

35. Model Rule 3.2 clearly acknowledges counsel's duty, as an officer of the court, to expedite litigation:

> Rule 3.2 EXPEDITING LITIGATION: A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
> Comment: . . . The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

36. *Cf.* Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 214-15 (N.D. Ill. 1975); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2, Comment (proposed final draft 1981) ("Any solution must necessarily involve appropriate disciplinary measures.").

37. 250 So. 2d 478 (La. App. 1971).

trial judge to vacate his refusal of a continuance, while paying lip service to the need for judicial control of diliatory practices.[38]

Fortunately, other courts have taken a more active role in deterring diliatory conduct. For example, in *In re Sutter*,[39] the United States Court of Appeals for the Second Circuit affirmed the trial court's denial of motions for substitution of counsel and for adjournments based upon counsel's claimed lack of preparation, and assessed $1,500 in costs on counsel for causing a three-day delay in the start of the trial pursuant to a local rule of court.[40]

Similarly, in *Associated Radio Service Co. v. Page Airways, Inc.*,[41] the trial judge required counsel to pay to the opposing party the expense of unnecessary proceedings caused by their failure to prepare and provide a court ordered discovery conference report, with directions that counsel not be indemnified by their clients.[42]

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38. The court noted that:

> We believe a court ought to have inherently the power to appropriately deal with a lawyer whose discourteous mishandling of a matter causes trial breakdown and the defeat of the court's judicial function by loss of a trial day .... In granting the writ, we alternatively ordered continuance on such conditions as the trial court considered just "including an order that present counsel provide the court with plaintiff's address so that the court may direct plaintiff to employ other counsel," ... [but] as S. CT. RULE 14 and as State Bar Ass'n Arts. of Incorporation, art. 12 § 2, grant lawyers a general license to practice law in the state, and neither trial court nor court of appeal is authorized to restrict the license.

Id. at 480. *But see* Link v. Wabash R.R., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962), affirming the dismissal of a complaint based on counsel's failure to attend a pretrial conference, and other diliatory conduct.

39. 543 F.2d 1030 (2d Cir. 1976).

40. Rule 8 of the Individual Assignment and Calendar Rules for the Eastern District of New York provides:

> Rule 8. SANCTIONS.
>
> (a) Dismissal or default. Failure of counsel for any party to appear before the court at a conference, or to complete the necessary preparations, or to be prepared to proceed to trial at the time set, may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against the defaulting party either with respect to a specific issue or on the entire case.
>
> (b) Imposition of costs on attorneys. If counsel fails to comply with Rules 3(f), 6(f) or 7 or a judge finds that the sanctions in subdivision (a) are either inadequate or unjust to the parties, he may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business.

41. 73 F.R.D. 633, 25 F.R. Serv. 2d 218 (N.D. Tex. 1979).

42. *See also* United States v. Lespier, 558 F.2d 624, 628 (1st Cir. 1977) (assess-

D. Mary Carter Agreements

The "Mary Carter Agreement," in its most common form, is a secret settlement contract pursuant to which one of several co-defendants agrees to pay plaintiff some amount up to a stated maximum to be reduced or eliminated altogether depending upon plaintiff's recovery from the remaining co-defendants.[43] While such agreements have been upheld in several states, at least when the agreement had been fully disclosed and when the record did not provide definite evidence that the participating co-defendant collusively feigned actual adversity during the trial to the prejudice of the non-participating co-defendant,[44] such agreements have been condemned when they distorted the adversary system and resulted in sham litigation.

In *Daniel v. Penrod Drilling Co.*,[45] a Jones Act employee of Penrod sued for injuries suffered aboard a crewboat en route to an

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ment of costs and punishment by contempt available for contumaceous behavior or delaying tactics).

For discussion of the inherent power of courts to levy fines and other sanctions on counsel *see* Note, *Civil Procedure — Power of Federal Courts to Discipline Attorneys for Delay in Pre-Trial Procedure*, 38 NOTRE DAME LAW. 158 (1962); Comment, *Attorney's Negligent Failure to Comply with Procedural Deadlines and Court Calendar Orders — Sanctions*, 47 TEX. L. REV. 1198 (1969).

I have not attempted to catalog other strategems designed to hinder the opponent's preparation, or prolong the proceedings. *See, e.g.*, Kiefel v. Las Vegas Hacienda, Inc., 39 F.R.D. 592, 596 (N.D. Ill. 1966) (improper pressure brought to bear to prevent appearance of court reporter as a witness); Kenney v. Superior Court, 255 Cal. App. 2d 106. 63 Cal. Rptr. 84 (1967) ("cornering" medical experts by placing them on a community "medical committee"); Rousseau v. West Coast House Movers, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (1967); Sweet v. Stutch, 240 Cal. App. 2d 891, 50 Cal. Rptr. 9 (1966) (excessive jury voir dire).

43. The agreement takes its name from Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. App. 1967). *Compare* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1346 (1977):

> If an attorney has entered into an agreement of this nature, the concealment of it or the failure to reveal it could be misleading and deceptive to opposing counsel, the court and the jury. Accordingly, we think that in the interest of complying with the intent of the quoted Disciplinary Rules [DR1-102 (A)(4); DR 7-102 (A)(6), (7)]. A lawyer should reveal promptly to opposing counsel and to the court the existence of any agreements of this nature. This should be done in sufficient time for opposing counsel to be afforded an opportunity to take appropriate steps and employ proper procedures to safeguard the interests of his clients.

44. *See* Note, *Are Gallagher Covenants Unethical?: An Analysis Under the Code of Professional Responsibility*, 19 ARIZ. L. REV. 863 (1977).

45. 393 F. Supp. 1056 (E.D. La. 1975).

offshore location where Penrod was performing services for Chevron. Chevron was responsible for furnishing transportation to the offshore job site, and contracted with Popich Brothers to provide the crewboat. Plaintiff sued Daniel, Popich, and Chevron. Penrod claimed indemnity from Popich and Chevron, and Chevron's defense was assumed by Popich. At noon recess on the first day of trial plaintiff secured an agreement from Penrod's counsel "not to maintain an agressive, destructive posture vis-a-vis plaintiff's case, its witnesses, etc." in return for a promise of Penrod's dismissal, with prejudice, at the close of the evidence. The agreement was concluded, but was not revealed to the court and Popich's lawyers until just before the case went to the jury. After the jury returned a verdict against Popich and Chevron, the trial judge granted a new trial observing that:

> Courts are not mere arenas where games of counsel's skill are played. Even in football we do not tolerate point shaving. It is perhaps because the trial is adversary that each side is expected to give its best, without secret equivocation.[46]

A similar condemnation of the "Mary Carter agreement" was made in *Lum v. Stinnett*,[47] an opinion which catalogs many of the strategems facilitated by such agreements. In that case plaintiff brought a medical malpractice action against three physicians: an emergency room physician, a family physician, and Dr. Lum, the physician who read plaintiff's X-rays. All were alleged to have failed to detect a compression fracture of plaintiff's spine. Prior to trial plaintiff procured a secret agreement from Dr. Lum's co-defendants settling the claims against them in return for their cooperation at trial. Pursuant to the agreement counsel for the participating co-defendants distorted the jury selection process and by reserving their opening statements, forced Dr. Lum's counsel to do the same or risk having no means of meeting the opening statements of counsel for Dr. Lum's co-defendants. In addition, plaintiff's counsel managed to call the participating "co-defendants" as if on cross-examination, allowing him to employ leading questions at will, and successfully oppose full cross-examination by Dr. Lum's counsel on the ground that his own interrogations were "cross-examination." Meanwhile, counsel for Dr. Lum's co-defendants sat placidly, conveying to the jury the

46. *Id.* at 1060.
47. 87 Nev. 402, 488 P.2d 347 (1971).

message that only Dr. Lum had cause for concern. This message was reinforced when the court granted the co-defendant's motions for dismissal, without opposition, at the close of the plaintiff's case. Distinguishing cases in which similar agreements had not resulted in any "diminuation in the vigor" of the co-defendant's presentation,[48] the court observed that the agreement before it:

> called for improper conduct on the part of all attorneys concerned; and while we recognize they become involved only out of devotion to their clients, the agreement nonetheless contravened policy expressed in the Rules of Professional Conduct .... Such irregularities so warped presentation of the case as to deny a fair trial.[49]

Given the apparent judicial approval of the "Mary Carter agreement" in several jurisdictions, and its ambiguous status in others, it must be assumed that the device will continue to flourish. Thus, the first line of defense of any prudent trial counsel will be formal discovery of secret settlement agreements so that their details may be brought to the attention of the trial judge before trial. One commentator recommends that the following tag interrogatory be submitted as a matter of routine:

> Has the plaintiff entered into any settlement or arrangement with any party to the suit or with any person potentially liable to the plaintiff, and if so, as to each such arrangement, state the particulars and identify by a sufficient description all documents pertaining to it.[50]

III. Presenting the Case-In-Chief

A. The Deliberate Injection of Inadmissible Evidence

In spite of the clear dictates of the Code of Professional Responsibility that counsel may not "state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence,"[51] many lawyers

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48. *Id.* at ____, 488 P.2d at 351, n.5.

49. *Id.* at ____, 488 P.2d at 352-53.

50. G. VETTER, SUCCESSFUL CIVIL LITIGATION: HOW TO WIN YOUR CASE BEFORE YOU ENTER THE COURTROOM 150 (1977).

51. *See also* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR7-106(c)(1) (Final Draft 1981). *See also* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4(e) (Proposed Final Draft 1981):

> [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 ....

CODE OF TRIAL CONDUCT (American College of Trial Lawyers 1972) adds to these conventional proscriptions a more general proposition, ¶ 23(e) and (f), that:

> A lawyer should never attempt to place before the court, jury or

cannot resist the temptation to elicit objectionable and prejudicial evidence, and then move forward without a pause to preclude objection or a motion to strike.[52] In fact, there is an attitude prevalent in the trial bar that:

> [an] improper question should be asked unless it is of such prejudicial character that the refusal of the trial court to declare a mistrial would be reversible error. This practice is sometimes used for the very purpose of confronting adverse counsel with the difficult choice of waiving objection by failing to make it, or else make an objection that may lead the jury to conclude that he is attempting to withhold information from them.[53]

Unless trial judges deal sternly with such unfair tactics[54] the aggrieved party will have little recourse. Some examples of improper questioning on direct and cross-examination illustrate the nature of such gamesmanship.[55]

> public evidence which he knows is clearly inadmissible, nor should he make any remarks or statements which are intended improperly to influence the outcome of any case.
>
> . . .
>
> A lawyer should not propose a stipulation in the jury's presence unless he knows or has reason to believe the opposing lawyer will accept it.

52. *See* KEETON, *supra* note 22, at 45.

53. *Id.* at 59. *Compare* Curtis v. Greenstein Trucking Co., 397 F.2d 483 (7th Cir. 1968) (trial court did not abuse its discretion in determining that plaintiff's asking of objectionable questions, thereby forcing defendants' counsel to make 60 objections, only 7 of which were overruled, did not have a prejudicial effect on the jury).

Of course, the Code does not prohibit counsel from asking questions merely because there is some doubt about admissibility, although the better practice is for counsel to seek a ruling on admissibility before trial, thereby insuring that expected testimony may properly be incorporated into the opening statement. *Cf.* County of Maricopa v. Maberry, 555 F.2d 207, 222 n.18 (9th Cir. 1977). There are many examples of similar misconduct in the presentation of opening statements. *Compare* United States v. Schindler, 614 F.2d 227 (9th Cir. 1980) (reference, in opening statement in mail fraud prosecution, to a witness' concern for her life, and question on direct examination, "Did you ever have a conversation with Mr. Schindler during which the subject of contracts to kill someone arose?"); Smith v. Covell, 100 Cal. App. 3d 947, 161 Cal. Rptr. 377 (1980) (reference in opening statement to purported diagnoses that plaintiff's pain was "in her mind, that she has an antagonism toward her husband and this is her way of punishing her husband," the statements being without factual support in the record). *See also* Note, *The Scope of Permissible Comment In A Civil Action In Kentucky*, 58 KY. L. J. 512, 520-25 (1970).

54. *See* text at note 22, *supra*.

55. Although the reading of part III suggests that discussion might be limited to the direct examination of witnesses, the same problems are encountered on cross-examination, and cases involving cross-examination are cited accordingly.

A classic example of the injection of inadmissible evidence occurred in *Fike v. Grant*,[56] in which a "general question" became the vehicle for a discussion of liability insurance. The daughter of a personal injury plaintiff testified that on the morning following the accident she went alone to defendant's place of business, and then was asked by plaintiff's counsel whether she talked about the accident:

> A. Would you like to know what I asked them?
> Q. You may tell all that was said.
> A. I went for the purpose of asking Mr. and Mrs. Fike —
> Q. Just a minute. Speak a little slower and talk to the jury.
> A. I went to the Fike's place of business to inquire about the insurance on their car and Mr. and Mrs. Fike —
> Q. Was that all you asked them?
> A. No.

Similar misconduct, clearly calculated, occurred in *County of Maricopa v. Maberry*.[57] During that trial an expert medical witness testified on behalf of the medical malpractice defendant that the decedent's death was the result of voluntary ingestion of a massive dose of amphetamines. At the close of cross-examination plaintiff's lawyer proceeded:

> Q. Doctor, at the time that your deposition was taken, I will ask you this, sir, isn't it a fact that at one point you interrupted and said: "Off the record. Come on, Ken —"
> [Counsel for defendant]: Your Honor, I object.
> Q. "Come on, Ken. You've got a damned good case and you know it." You said that, didn't you, Doctor?
> A. I don't recall.[58]

In another case, *Brown v. Royalty*,[59] counsel, through the following line of questioning, deliberately circumvented the trial judge's ruling that evidence concerning his client's failure to receive a traffic ticket was inadmissible. He also circumvented his

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56. 39 Ariz. 549, 8 P.2d 242 (1932).
57. 555 F.2d 207 (9th Cir. 1977).
58. The statement referred to was not, in fact, in the deposition. Citing counsel for violation of DR 7-106(C) the Court observed at 555 F.2d 207, 217 that:

> The lawyer did not pause after the objection of his opposing counsel to permit a statement of grounds for his objection, or permit the judge to rule, before the witness answered. There could be little doubt in any experienced trial lawyer's mind hearing this question, in the manner and sequence in which it was propounded, why it was asked.

59. 535 F.2d 1024 (8th Cir. 1976).

stipulation that he would not raise the issue that plaintiff's medical bills had been paid by a collateral source.

> Q. Officer, let me have that [the accident report] again. I think that covers what I was unable to read. Then, with reference to that portion of the report on page two, that calls for arrests, you show none, is that correct?
> A. Yes sir.
> . . .
> Q. Mr. Brown, these bills were all paid immediately after they were incurred, weren't they?
> A. No.
> Q. Within a month, I am talking about these medical bills.
> A. They were paid when I would pay them.
> Q. Now, Mr. Brown, you didn't pay those bills, did you?[60]

B. On Leading Questions

Closely related to the immediately preceding tactics is the practice of coaching witnesses while they are on the stand by means of leading questions.

Since the Code of Professional Responsibility does not explicitly condemn the practice of coaching a witness with leading questions[61] the problems of abuse of this tactic are ever present. Concerning this problem Judge Keeton notes:

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60. For examples of similar misconduct, *see* Mangan v. Broderick and Bascom Rope Co., 351 F.2d 24 (7th Cir. 1965) (workmen's compensation); Smith v. Covell, 100 Cal. App. 3d 947, ____, 161 Cal. Rptr. 377, 385 (1980) (improper references to adverse party's wealth); Hawk v. Superior Court, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974) (circumventing rule that prior arrests, or misdemeanor convictions, may not be used to impeach, by questions designed to bring before jury fact that witness was residing in jail); Cline v. Kirchwehm Bros. Cartage Co., 42 Ill. App. 2d 85, 191 N.E.2d 410 (1963); JEANS, *supra* note 6, at 29 (deliberate injection of question suggesting remarriage in a wrongful death case). *See also* State v. Haynes, 291 So. 2d 771 (La. 1974) (prosecutor not only deliberately attempted to question defense lawyer on what defendant had told him, and belittled counsel before the jury for asserting the attorney-client privilege, but also called defendant's wife to testify and requested that she claim the husband-wife privilege before the jury, all in violation of ABA STANDARD FOR THE PROSECUTION 5.7).

61. KEETON, *supra* note 22, at 49, suggests that the following provisions apply:

> DR 7-106(C): In appearing in his professional capacity before a tribunal, a lawyer shall not:
> . . .
> (7) Intentionally or habitually violate any established rule of procedure or of evidence.
> . . .
> EC 7-25: . . . a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

> The vice of the question is telling the witness what the lawyer wants him to say. Having received the message, the witness can then answer a non-leading question in the desired way, even though the leading question is stricken. Consequently you may sometimes be tempted to ask a leading question deliberately, realizing that an objection to it will be sustained.[62]

Consider the following line of questioning from a reported case:

> [During direct examination of a witness]
> Q. Directing your attention back to July, 1966, did you buy some virgin metal, virgin nickel from anyone in July, 1966?
> A. Yes, sir, I did.
> Q. Did you buy approximately eleven hundred ninety-nine pounds of metal back at that time?
> A. I did.
> [Defense counsel]: I object to leading. He should know how much he bought.
> The Court: I sustain the objection.
> [Defense counsel]: I ask that the jury be instructed.
> The Court: The jury is instructed they are not to consider the question for any purpose. I sustained the objection.
> Q. Do you recall how much of this virgin nickel you bought back in July of 1966?
> A. I bought eleven hundred ninety-nine pounds.
> [Defense counsel]: I objected after the leading question was asked of him and he turned around and asked how much. As important as that is to this case, I object to that being brought into evidence. He put words in his mouth and then asked him again.
> The Court: That's overruled.[63]

In this example, the court's cautionary instruction was completely ineffectual, and the jury, in effect, heard the "testimony" twice.

Experienced trial lawyers will use objections to leading questions cautiously, fearing that little will be gained by repeated objections and that such objections might cause resentment on the part of the jury.[64] All too often the result of this is that the proponent of testimony will be tempted to cross the line between occasional and unconscionable coaching. For example, in *Straub v.*

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62. KEETON, *supra* note 22, at 49.

63. Lawrence v. Texas, 457 S.W.2d 561 (Tex. App. 1970) (the appellate court stated the conventional rule that a case will not be reversed in the absence of a showing that the trial judge abused his discretion in allowing leading questions).

64. *Compare* F. LANE, 2 GOLDSTEIN TRIAL TECHNIQUES § 13.01 (1969).

Reading Co.,[65] an FELA case tried in the Eastern District of Pennsylvania, the appellate court observed:

> Regarding leading questions, appellee [plaintiff below] asserts that this problem is within the control of the trial court .... But where that control is lost or at least palpably ignored and the conduct is a set pace running the length of the trial which produces a warped version of the issues as received by the jury, then that body never did have the opportunity to pass upon the whole case and judgment based on that kind of twisted trial must be set aside.
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> ...
>
> [In the case at bar] little seems to have been left to a spontaneous explanatory answer. At times the witnesses seemed relatively unnecessary except as sounding boards.[66]

C. Dumb Shows, Improper Displays and Other Dirty Tricks

The most notorious "dirty tricks" on record consist of ingenious efforts to distract or mislead the jury by means of "dumb shows."[67] Arguably not all "dumb shows" are unethical, however many are. Fortunately, few attorneys would attempt the more outlandish exhibitions, but that is not to say that such tricks will not turn up in tomorrow's reporters.

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65. 220 F.2d 177 (3d Cir. 1955).

66. *Id.* at 179, 182. *But see* Gardner v. Meyers, 491 F.2d 1184 (8th Cir. 1974) (leading questions used 81 times, but in the absence of objection at trial issue could not be heard on appeal).

67. The terminology is from VETTER, *supra* note 50, at 225. A few examples related by a variety of commentators should illustrate the nature of such "nonverbal persuaders."

> An artifice often attributed to Clarence Darrow ... a nearly invisible wire is inserted into a cigar so that when the cigar is smoked everyone's attention will be focused on the ash, which magically does not fall ....

McElhaney, *supra* note 5.

> I came to court with more than a silver-tongued argument. I brought an exhibit ... an L-shaped package wrapped in ... butcher's paper .... I could see the jurors sizing up my client dressed in demure gingham, her one good leg in a black stocking, and then shifting their gaze to the L-shaped package and whispering to one another among themselves.

M. BELLI, MELVIN BELLI: MY LIFE ON TRIAL 107-08 (1976).

> In one trial in which the client was charged with negligence by a middle-aged businessman whose wife died in an auto wreck, he had his attractive blonde secretary come into the courtroom at the end of the trial and sit next to the widower. Following Mr. ____'s instruc-

> tions, she asked the man an innocent question, smiled, patted his hand and quickly left. "Just one look at the cold expressions on the lady jurors' faces was enough to tell me that we were home free," Mr. ____ recalls with a smile.

J. O'CONNELL, THE LAWSUIT LOTTERY, *supra* note 3, at 32. The appropriate response to this ploy is provided by McElhaney, *supra* note 5:

> Q. Who do you work for?
> A. The defendant.
> Q. Do you have any information about the crash that gave rise to this case?
> A. No.
> Q. You leaned over and spoke to [plaintiff] earlier today, didn't you?
> A. Yes.
> Q. Do you know [plaintiff] socially?
> A. No.
> Q. Have you ever seen [plaintiff] or talked to [plaintiff] before today?
> A. No.
> Q. Was [plaintiff] pointed out to you?
> A. Yes.
> Q. No further questions.
> . . .

> 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 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.

Wilkes, *Life In the Fast Lane: The Adversary Ethics of an Ex-Lawyer,* 7 CRIMINAL DEFENSE, March-April 1980 at 11, 12.

> . . . [H]e intended to call the decedent's mother as a witness in a wrongful death action. He suggested that she might need an interpreter since she had immigrated After World War II . . . . Someone on plaintiff's side suggested the daughter [and sister of the decedent]. . . . the bailiff placed a chair next to the witness box. The sister sat in it facing the jury and out of sight of the judge.
>
> Counsel began his examination. The mother understood and answered perfectly. The examination continued perfectly. The daughter did not have to interpret a word. But as counsel began to ask the mother about the boy, the sister's lip began to quiver. She soon was stifling sobs.

VETTER, *supra* note 50, at 227.

> When the models were not in use, they rested in direct view of the jury on the counsel table. It seemed like every time counsel for the Beechcraft interests looked over, the Beechcraft was positioned so that it was banking right, flying into the rear of the Cessna.

Id. at 228.

The most recent "dirty trick" of national notoriety occurred in *United States v. Thoreen*.[68] Attorney Thoreen represented Sibbett, a commercial fisherman who was tried for violating a preliminary injunction against salmon fishing. In the hope that the government agent who had cited his client might not be able to identify him, Thoreen placed a "ringer" next to him at counsel table in place of the client, without notifying the court or governmental counsel of the substitution. This deception was compounded by counsel's gesturing to the substitute as though he were the defendant, and allowing to go uncorrected the trial judge's references to him as the "defendant." After leading two government witnesses to misidentify the charlatan, the substitution was disclosed. Thoreen's tactic was a clear violation of the Code of Professional Responsibility,[69] and resulted in a finding of criminal contempt.

Another recent instance of gross misconduct was reported in *Richardson v. Employers Liability Assurance Corp., Ltd.*,[70] a suit for Employer's alleged failure to settle claims in good faith under the uninsured motorist provisions of an insurance policy. During the second day of trial, defense counsel moved for a mistrial on the ground that plaintiff's counsel had placed a photo-copy of a legal newspaper on counsel table, in full view of the jurors, which bore the headline:

> DIDN'T SETTLE IN POLICY LIMITS;
> OK MENTAL SUFFERING AWARD

Plaintiff's counsel's transparently lame explanation was that the newspaper article was reference material, although the case reported was three years old, and available in the official reports. By obtaining the cooperation of the trial judge, defense counsel were able to note the position of the "exhibit" and take photographs from several points in the courtroom to preserve the record for appeal. The appellate court opined:

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68. 653 F.2d 1332 (9th Cir. 1981).

69. The Court cited, *inter alia*, ABA Committee on Professional Ethics, Informal Op. 914 (1966). *Compare* Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947) (reporting the court-martial of a second lieutenant for a similar ploy during the defense of an American soldier of Mexican descent charged with rape). KBA v. Taylor, 482 S.W.2d 574 (Ky. 1974). *In re* Metzger, 31 Hawaii 929 (1931) (substituting bogus handwriting exhibit to facilitate cross-examination of expert witness).

70. 25 Cal. App. 3d 232, 102 Cal. Rptr. 547 (1972).

> As heretofore stated, counsel for plaintiffs stated he had the article on the table for use in discussing jury instructions "and other leading points." This excuse is incredible. We cannot help but conclude that the article with prominent headlines was exposed for the purpose of influencing the jury. No one knows whether any jurors saw the headlines, and if so, what, if any effect they had on the jury in its deliberations. It would appear from the size of the verdicts that the headlines might have influenced the jury. Under such circumstances we hold that the trial court abused its discretion in not granting defendant's motion for mistrial.[71]

D. Some Objections to Objections

Not all trial judges take care to preclude counsel from making argumentative comments in the course of making objections.[72] As a result "objections for jury purposes" are not uncommon in American courtrooms.[73] Such "speaking objections" should be viewed as a violation of EC 7-25 of the Code of Professional Responsibility, that "a lawyer should not by subterfuge put before a jury matters which it cannot properly consider."[74] However it is often difficult to distinguish a legitimate objection accompanied by an explanation of grounds from a frivolous objection used solely for argument.

An example may serve to illustrate the side of the line to which counsel may not venture.Plaintiff claimed that he injured his back in a fall. During cross-examination he admitted that he had had back trouble for ten years, and had taken treatments for it. The cross-examination sought to explore this avenue further where upon plaintiff's counsel interrupted:

> Just a minute. Let us get these things straight. If you are talking about things other than the back that is another story. I object to your suggestion that a cold or bronchitis would have anything to do

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71. *Id.* at ____, 102 Cal. Rptr. at 555, *Compare* Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1169 (7th Cir. 1968) (attempt to slip exhibit into jury room which had been denied admission more than once).

72. KEETON, *supra* note 22, at 196.

73. *Compare* M. BELLI, MODERN TRIALS 616 (Student ed. 1963):
> An exception to the rule of objecting only when counsel is prepared to sustain the objection is "objection for jury purposes." Every trial lawyer is familiar with this procedure. It is not unethical if its purpose is further to emphasize, for example, the limited purpose of the introduction of certain testimony.

74. McElhaney, *Making and Meeting Objections,* 2 LITIGATION 43 (1975).

with this. I have the record from which I would like to read; it is the official company record, the medical record in this case, and I think I picked out in my direct examination each and every time when there was anything that could possibly be associated with this back,—if Your Honor will look at this.

When cross-examination could continue, plaintiff was asked,

Q. How many times did you see Dr. B____ for back trouble?
A. Once.
Q. Just one time?
A. That was caused by my bronchial condition.
Q. Over a period of ten years —.

At this point plaintiff's counsel injected,

That was on account of a bronchial condition the witness said.

Later, one of the plaintiff's medical experts was being cross-examined regarding plaintiff's history of back pain. The following colloquy occurred in the presence of the jury:

Q. Mr. S____ has testified that he had pain with his back for 10 years before his accident, doctor.
[Plaintiff's counsel]: That is not accurate at all, Your Honor, and I absolutely object to Mr. M____ insinuating that sort of thing into this record because that is not so.
The Court: He said that his back was his weak spot and that he had trouble with that, but nothing in the way of an accident had been testified to.
[Plaintiff's counsel]: And moreover he said he had two periods in which for short periods of time he had some pain in his back and I have these records right in front of me, now, Mr. M____, you are not going to put things into this record that aren't in it, and I am going to stop you.
Let us go right to the record and see. In 1942, Your Honor — I have all these records right here — in 1942 we have an acute cervical sprain which lasted 4 1/2 days. Now, there is nothing more on the back until in 1944, several cervical fractured ribs when he was helping a friend down the steps, and that was a question of six days. Now, we have nothing until we get to 1947 when we have the man with an acute bronchial pneumonia which threw his back out — that is 1947, Your Honor.
Now, there is nothing whatsoever between 1947 and 1949, the date of this accident, which is over two years.
. . .
[Defense counsel]: If Your Honor please, I want to point out, in view of [Plaintiff's counsel's] remarks I want to remind the Court and also [Plaintiff's counsel] that on the cross examination of Mr. S____ I said to him: "G____, haven't you had sacroiliac trouble for the past ten years and received treatment during that time," and after a while he said yes. Now, that is what I had in mind.

> [Plaintiff's counsel]: And all that Mr. S____ meant is that 10 years ago was the first time that he had anything with his back. But here are the actual records, and there is no use in trying to insinuate into this case that here is a man who had trouble within a 10 year period, and that is not so.
> [Defense counsel]: I move for the withdrawal of a juror.
> The Court: I think we got that all pretty clearly.
> [Defense counsel]: I move for the withdrawal of a juror, if Your Honor please, that [Plaintiff's counsel] is making statements of fact to the jury that are not in the record.
> [Plaintiff's counsel]: Are you through with this man?
> [Defense counsel]: No. I assume that motion is overruled Your Honor?
> The Court: Do you want to put a question?

A second of plaintiff's medical witnesses was also cross-examined to determine if the doctor had been given a history of plaintiff's prior complaints regarding his back:

> Q. Did Mr. S____ tell you whether he had any trouble with his back before this accident?
> A. Yes, I heard a report he had one in 1947 —
> [Plaintiff's attorney interrupting]: In 1942 there was something about bronchial pneumonia and some subluxation of the sacroiliac which was corrected.

In reversing a jury verdict for the plaintiff the appellate court opined:

> Where the above type of trial tactics is continued for the duration of a trial as here it is difficult to keep the opinion from being to some extent a catalogue of illustrative incidents. Therefore pausing for brief comment on the above related series, we note that the defense attorney was unfairly hampered in his cross-examination by [Plaintiff's attorney]. The latter improperly averted the attention of the jury from the prior back condition to the bronchitis; he deliberately and improperly made statements concerning what he called "the medical record in this case" which was not yet in evidence. In all of this despite the objections of counsel, the trial court neither admonished him nor endeavored to advise and guide the jury as to the significance of these occurrences. The net of it was that the conduct not only remained unchecked but as far as the jury could be expected to understand was in effect approved by the court.[75]

Another purpose of "speech-making" is directed not to the jury, but to the witness, "giving the witness time to think, calling his

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75. Straub v. Reading Co., 220 F.2d 177, 179 (3d Cir. 1955).

attention indirectly to a trap into which he may be falling, or indirectly suggesting a good answer."[76]

Professor Jeans suggests that the best antidote for this abusive objection is a counter-punch: "I object to counsel instructing the witness as to the desired answer."[77]

Finally, almost every trial attorney has encountered an adversary who appears to be objecting solely to disrupt the flow of testimony,[78] or "change the momentum."[79] All too often such objections are simply injected for purposes of harassment.[80]

IV. Cross-Examination

Pity the witness:

> Of all unfortunate people in this world, none are more entitled to sympathy and commiseration than those whom circumstances oblige to

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76. *Keeton, supra* note 22, at 174-75. For example, from A. NORRILL, TRIAL DIPLOMACY 58 (2d ed. 1972):

> Q. Have you ever talked to anybody about this case?
> A. No.
> Q. Have you ever talked to a lawyer about the facts of this case?
> A. No.
> Objection: I'm going to object to this line of cross-examination because the questions are tricky and not clear to the witness. It's perfectly obvious that the witness has talked to me in my office and has talked to his relatives and friends about the case, but only in relation to what he actually witnessed.

Another example from JEANS, *supra* note 6, at 360:

> Q. How many times was the plaintiff absent from work during this period of alleged disability?
> Lawyer: I object Your Honor, this witness has no specific memory as to this and besides the work records would be the best evidence.
> Court: Overruled.
> A. I really have no specific memory as to this.

77. JEANS, *supra* note 6, at 174.

78. Ordover, *supra* note 2, at 314.

79. *Cf.* JEANS, *supra* note 6, at 358-59.

80. Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1165 (7th Cir. 1968). In the lower court's opinion granting a new trial and assessing costs on the offending attorney, the trial judge noted at 39 F.R.D. 592, 596:

> Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead he seeks to use his experience to assert and apply every sly trick and strategem to win his case. He does this with the hope that he can stay within the bounds of professional ethics. In this instance he has far overstepped the bounds.

appear upon the witness stand in court. You are called to the stand and place your hand upon a copy of the Scriptures in sheepskin binding, with a cross on the one side and none on the other, to accommodate either variety of the Christian faith. You are then arraigned before two legal gentlemen, one of whom smiles at you blandly because you are on his side, the other eying you savagely for the opposite reason. The gentleman who smiles, proceeds to pump you of all you know; and having squeezed all he wants out of you, hands you over to the other, who proceeds to show you that you are entirely mistaken in all your supposition; that you never saw anything you have sworn to; that you never saw the defendant in your life; in short, that you have committed direct perjury. He wants to know if you have ever been in state prison, and takes your denial with the air of a man who thinks you ought to have been there, asking all the questions over again in different ways; and tells you with an awe inspiring severity, to be very careful what you say. He wants to know if he understood you to say so and so, and also wants to know whether you meant something else. Having bullied and scared you out of your wits, and convicted you in the eyes of the jury of prevarication, he lets you go. By and by everybody you have fallen out with is put on the stand to swear that you are the biggest scoundrel they ever knew, and not to be believed under oath. Then the opposing counsel, in summing up, paints your moral photograph to the jury as a character fit to be handed down to time as the typification of infamy — as a man who has conspired against innocence and virtue, and stands convicted of the attempt. The judge in his charge tells the jury if they believe your testimony, etc., indicating that there is even a judicial doubt of your veracity; and you go home to your wife and family, neighbors and acquaintances, a suspected man — all because of your accidental presence on an unfortunate occasion![81]

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81. F. WELLMAN, THE ART OF CROSS-EXAMINATION 194-95 (1936). *Compare* Commonwealth v. Rooney, 365 Mass. 484, ____, 313 N.E.2d 105, 112-13 (1974):

> [The judicial function] will not long succeed if a witness innocent of everything except his coincidental presence at a time and place where something relative to a crime occurred is to be subjected to a bruising, grueling and abrasive cross-examination in which questions are loaded with unsupported insinuations of improper motives, negligence, incompetence, perjury or, worse, suspicion of guilt of the crime for which the defendant is on trial. The doctor who sutured the defendant's knife wounds at the hospital emergency room was cross-examined as though he were a defendant in a malpractice case. The cross-examination of some of the Common-wealth's witnesses at the trial of this case violated their right to fair and reasonable treatment, and evidenced an unwarranted assumption that only the defendant had rights to be protected. The proper discharge of counsel's duty to

While attending law school, the would-be trial attorney is drilled on the cliche that "cross-examination is the most powerful instrument known to the law in eliciting truth,"[82] when he should also be forewarned that:

> [I]t is too often the case that [witnesses] are set up as marks to be shot at." But it certainly is the duty of the law and of the judges to see that due regard is paid to [the rights of the witness] and that the witness box does not unnecessarily become, in the words of an old Southern judge, "the slaughterhouse of reputations . . . ."[83]

The following provisions of the Code of Professional Responsibility are frequently ignored during the cross-examination of witnesses, as is illustrated in many judicial opinions:

> DR 7-106 Trial Conduct . . . .
> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
> (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
> (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
> (4) Assert his personal opinion . . . as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; . . . .
> . . .
> (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

A. Outright Harassment

In each of the following examples counsel's cross-examination served no legitimate purpose, and was intended to humiliate or degrade the witness.

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his client does not require such an assumption. Equally important, the integrity and continued efficacy of the judicial process cannot permit it. The judge presiding over the trial of a case has the power to keep the examination of witnesses within the limits of common decency and fairness, and he has the duty to exercise that power promptly and firmly when it becomes necessary to do so.

82. 5 WIGMORE ON EVIDENCE § 1362 n.1 (Chadbourn rev. 1970).

83. 3A WIGMORE ON EVIDENCE § 983 (Chadbourn rev. 1970), as cited in State v. Crawford, 202 N.W.2d 99, 103 (Iowa 1972).

Counsel for plaintiff approached the defendant, and after addressing him by name gratuitously added:

> Q. The last time I saw you, you had a plastic bag on your head—[84]

In another case, counsel, having been admonished not to interject his personal comments into the examination of witnesses, approached a prosecution witness who had manifested some inability to determine directions on an exhibit at trial:

> Q. Have you ever done any flying?
> A. No.
> Q. I recommend that you don't.[85]

And finally, a frustrated prosecutor, upon encountering difficulty in eliciting details of a transaction from a somewhat unwilling witness, asked:

> Q. Who told you to have a faulty memory?[86]

B. Cross-Examination By Innuendo

One of the most common abuses of cross-examination takes the form of a question implying a serious charge against the witness, for which counsel has little or no proof. All too often, trial attorneys ask such questions for the sole purpose of "waft[ing] an unwarranted innuendo into the jury box."[87] On the ethics of such questioning, Judge Keeton observes:

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84. International Ass'n of Bridge, Structural & Ornamental Iron workers, Local 387 v. Moore, 149 Ga. App. 431, 254 S.E.2d 438, (1979) (the court offered counsel a mistrial).

85. Hawk v. Superior Court, 42 Cal. App. 3d 108, ____, 116 Cal. Rptr. 713, 724 (1974) (counsel held in contempt).

86. Aiuppa v. United States, 393 F.2d 597, 601 (10th Cir. 1968) (holding trial court's striking the testimony or comment and admonishing the jury to disregard it was sufficient cure).

87. Michelson v. United States, 335 U.S. 469, 481, 69 S. Ct. 213, 221, 93 L. Ed. 168, 176, (1948). *Compare* Haynes v. State, ____, Ind. App. ____, ____, 411 N.E.2d 659, 665 (1980):

> Improper matters cannot be introduced into the awareness of the trier of fact by formulating a question that is pregnant with an unsubstantiated assertion of fact [citing DR 7-106(C)(2)]
>
> . . . An attorney should not contrive a cross-examination based on fictitious assumptions when to do so would only confuse the fact finder and impede the search for truth.

Accord Love v. Wolf,226 Cal. App. 2d 378, ____, 38 Cal. Rptr. 183, 188 (1964) (accusatory questioning such as "Your job is to make thirty dollars profit on every one hundred pills, isn't it" and "did you know that . . ." questioning); People *ex*

> The code is surely violated . . . by implication of charges known to be false, and perhaps it condemns as well those based on mere suspicion [citing DR 7-106(C)(1), (2) and (7)].[88]

The trial judge has considerable discretion to limit cross-examination which is not directed to the real issues of the case, and which suggests misconduct on the part of the witness.[89] Moreover, the trial judge may caution counsel or demand a showing of "good faith" as a prerequisite to such cross-examination.[90] Authority may even be found sustaining the right of the opposing party to call the cross-examiner to the stand and inquire into the "good faith basis" for a line of questions.[91]

Unfortunately, the improper examination is not always spotted for what it is, admonitions are not given by the Court, or admonitions are not heeded. The only remedy left for the aggrieved party is a new trial. Some illustrations are in order.

In *Marsh v. State*,[92] defendant was charged with first degree murder in the shooting of his father-in-law and was found guilty

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rel. Dept. of Pub. Works v. Lillard, 219 Cal. App. 2d 368, ____, 33 Cal. Rptr. 189, 196 (1963), wherein the court opined:

> These "did you know that" questions designed not to obtain information or test adverse testimony but to afford cross-examining counsel a device by which his own unsworn statements can reach the ears of the jury and be accepted by them as proof have been repeatedly condemned.

88. KEETON, *supra* note 22, at 100 n.2. *See also* Boulton, *supra* note 22, at 78-79:

> In a cross-examination which goes to a matter in issue, it is not improper for counsel to put questions suggesting fraud, misconduct or the commission of any criminal offense (even though he is not able or does not intend to exercise the right of calling affirmative evidence to support or justify the imputation they convey), if he is satisfied that the matters suggested are part of his client's case and has no reason to believe that they are only put forward for the purpose of impugning the witness's character.
>
> Under the rules of evidence, affirmative evidence cannot in general be called to contradict answers given to questions asked in cross-examination directed only to credit.
>
> Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true.

Compare Model Rule 4.4.

89. *See, e.g.*, State v. Crawford, 202 N.W.2d 99 (Iowa 1972) (collecting cases).

90. *Cf.* United States v. Greer, 643 F.2d 280 (5th Cir. 1981).

91. United States v. Pugliese, 153 F.2d 497, 499 (2d Cir. 1945). *Cf.* United States v. Cardarella, 570 F.2d 264, 268 (8th Cir. 1978).

92. ____, Ind. App. ____, 387 N.E.2d 1346 (1979).

by reason of insanity. During the cross-examination of the defendant, the prosecutor asked:

> Q. Mr. M____, isn't it a fact that the only time you have sought psychiatric counseling or have used insanity as a defense are the two times criminal charges were brought against you, once in December of 1975 and another time in February of 1972, isn't that a fact, sir?

After a bench conference the prosecutor withdrew the question, but the trial judge refused to admonish the jury that no such prior pleas had been interposed. In fact, the 1975 charge was not a criminal charge, but a civil commitment proceeding instituted by defendant's wife, and the 1972 charge had been dismissed. In reversing defendant's conviction, the appellate court observed:

> Where counsel elects to attack the credibility of a witness on cross-examination through questions designed to impeach on collateral matters, he impliedly represents to the court that he is prepared to dispute a denial. In order to ask such questions, the attorney must have a reasonable basis for believing that the answer will be relevant, that is, impeaching. Without information upon which to form a reasonable belief that the witness's response will be impeaching, a reasonable basis for asking a question which is intended to degrade the witness does not exist. Indeed, if the attorney has no reasonable basis to believe the question is relevant to the case and the question degrades the witness, asking it violates Disciplinary Rule DR 7-106(C)(2) of the Code of Professional Responsibility. See also: Ethical Consideration, EC 7-25.[93]

Kiefel v. Las Vegas Hacienda, Inc.[94] not only provides an illustration of improper cross-examination, but also suggests a meaningful remedy for such abuses. Plaintiff had brought suit against a motel chain to recover damages from an assault inflicted by an intruder who gained entry to her room. During his cross-examinations of plaintiff and her husband defense counsel propounded questions insinuating that plaintiff and her husband had had an altercation the previous evening, that her husband had made numerous calls to plaintiff's room prior to the assault, and that she recognized the intruder as her husband. When such ques-

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93. *Id.* at ____, 387 N.E. 2d at 1348. *Compare* United States v. Haskell, 327 F.2d 281 (2d Cir. 1964) (cross-examination based on erroneous FBI "rep sheet" not reversible error where prosecutor and trial judge moved promptly to correct erroneous impression that jury might have acquired). *See also* Dukes v. State, 356 S.2d 873, 875 (Fla. App. 1978); Bagnell v. State, ____, Ind. App. ____, ____, 413 N.E.2d 1072, 1076-78 (1980).

94. 39 F.R.D. 592 (N.D. Ill. 1966), *aff'd*, 404 F.2d 1163 (7th Cir. 1968).

tions elicited denials, counsel intended that impeachment would follow, when in fact no impeachment would follow. The trial judge found that such tactics, coupled with a variety of other abuses, not only justified a new trial, but also an assessment of costs and attorney fees against the defendant and defense counsel, jointly and severally, in the amount of $8,171.56.[95]

C. The Attorney As A Witness

Closely related to the immediately preceding topic is the problem of impeaching a witness by way of a prior oral inconsistent statement allegedly made to the cross-examining attorney. The Code of Professional Responsibility contains several provisions which might prohibit such impeachment. Under DR 5-102(A) counsel must withdraw if he or she will be a witness. In addition, DR 7-106(C)(3) precludes counsel from "asserting his personal knowledge of the facts in issue, except when testifying as a witness." Nonetheless, cross-examiners frequently put questions to the witness in the form of "didn't you tell me" thereby pitting the credibility of the witness against that of the examining counsel. This technique is particularly prejudicial in criminal cases. For purposes of illustration, consider the following line of questioning:

> Q. Now, it is true, isnt' it, Mr. [Defendant], that you have sold some records through your shop that were boosted or stolen or that you had reason to believe were boosted or stolen?

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95. The award was made pursuant to 28 U.S.C. §§ 1920, 1021, 1023 and 1927. Section 1927 was amended in 1980 to provide:

> § 1927. Counsel's liability for excessive costs.
> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to *satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.* (emphasis added)

Compare the same counsel's conduct in Neusus v. Sponholtz, 369 F.2d 259, 260 n.2 (7th Cir. 1966) and O'Shea v. Jewel Tea Co., Inc., 233 F.2d 530, 533 (7th Cir. 1956). *See also* Smith v. Covell, 100 Cal. App. 3d 947, ____, 161 Cal. Rptr. 377, 383-84 (1980):

> In cross-examination, [defense counsel] asked [plaintiff] whether Dr. Sternback or some other doctor had "told her" or "said" that her injury was a method "of getting attention" or "demonstrating dependence" or "hostility," thus suggesting some qualified doctor had formed an opinion that Mrs. Smith's problems were purely psychological. Objections to such questions were overruled. No evidence was later offered to support these insinuations.

A. I don't think I have, sir.
Q. Did we have conversation during a hearing here on 6 April of 1977 concerning whether or not you were dealing in boosted items?
A. I don't remember that.
Q. Do you recall telling me that you did sell boosted items but it wasn't in the quantities I thought?
A. I don't remember that either, sir.[96]

D. "It's For Impeachment"

The efforts of counsel to present evidence "through the back door" when its admission as substantive evidence is prohibited by an exclusionary rule are often as outrageous as they are ingenious. For example, in *Cote v. Rogers*,[97] defense counsel wished to get before the jury an article concerning an automobile accident that was the subject of the litigation. After attempting unsuccessfully to introduce the article through a highway patrolman, either as part of the patrolman's "expert testimony" or as a "public or semi-public document," counsel arranged for its appearance in the local newspaper on the second day of trial, and its broadcast on a radio station that evening. He attempted to justify his conduct by insisting that his part-time job as City Attorney was:

> ... often dependent upon a good relationship with the only newspaper in the community. The more items of newsworthy interest

96. United States v. Cardarella, 570 F.2d 264, 267 (8th Cir. 1978). *See also* United States v. Puco, 436 F.2d 761, 762 (2d Cir. 1971) (involving a series of questions, each beginning "Did you tell me..." or "Do you recall me asking you ..."). In Jackson v. United States, 297 F.2d 195, 198 (D.C. Cir. 1961) Judge, now Chief Justice, Burger, opined:

> In the trial of this case trial counsel asked the detective if he recalled a telephone conversation in which the officer told defense counsel that he did not see the defendant with anything in his hand; that he hadn't seen him drop anything in his hand; and that what he said he saw was the defendant making some sort of motion which he interpreted to be a pitching motion, and that he didn't see him drop anything. The officer categorically denied such a conversation.
>
> No effort was then made by defense counsel to follow this line of questioning with proof of the alleged 'facts' or of the assumptions implicit in the questions. To be sure, it might have been awkward for the lawyer to take the stand and testify, but if he was not prepared to do this, even if it meant withdrawing from the case he should not have asked the questions. Counsel asking such questions with no intention of following them up if the answers were negative, would be subject to severe censure.

97. 201 Cal. App. 2d 138, 19 Cal. Rptr. 767 (1962).

> that a person in such a position can furnish to the press the better the relationship. Presumptively juries do not read, nor are they influenced by articles in newspapers.[98]

A more common and sophisticated technique is to introduce otherwise inadmissible evidence for a more limited, but proper purpose. Frequently, such efforts are completely disingenuous. Returning to a previous case[99] in which the defense hoped to suggest that the plaintiff's symptoms were manufactured, the following questions were propounded:

> Q. Did he [a psychiatrist] tell you in a sense that the pain that you were having was a method of obtaining dependency?
> A. Repeat that. I don't understand it.
> Q. Did he tell you that the pain you were experiencing was a method by which you would get attention, a method by which you could be dependent on other people?
> A. No. I don't remember that.
> Q. Did he tell you that your pain represented a method by which you could express hostility?
> A. No.

Defense counsel overcame the plaintiff's objections to this line of inquiry by arguing that the questions were proper for impeachment purposes. The appellate court reversed. After noting that the questions called for "patent hearsay evidence" for which no exception was cited, the court observed:

> Unless such opinions were true and in fact stated to Mrs. Smith by Dr. Sternbach, they would have no bearing upon her credibility for impeachment purposes. *No such foundation was tendered. The barefaced claim that question was for impeachment does not circumvent the bar of hearsay rule.* The claimed out-of-court declarations do not come within any cited exception to the hearsay rule. California courts have repeatedly held attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions, argument or other names. (emphasis added)

A particularly skillful job of "laying the foundation" for the introduction of evidence of a subsequent remedial measure "for impeachment purposes" was the subject of an opinion in *Daggett v. Atchison, Topeka and Santa Fe Ry. Co.*[100] In that case the plaintiff

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98. *Id.* at ____, 19 Cal. Rptr. at 770. Needless to say, plaintiff's motion for a new trial was granted.

99. Smith v. Covell, 100 Cal. App. 3d at ____, 161 Cal. Rptr. 377 at 384.

100. 48 Cal. 2d 655, 313 P.2d 557 (1957). A particularly critical discussion of the cross-examination in this case is presented in O'CONNELL, *supra* note 4, at 177-182.

widower sought to recover for the wrongful death of his wife and children which resulted from a collision between their car and defendant's train at a crossing. At the time of the accident the general railroad speed limit was ninety miles per hour. After the accident, the railroad reduced the speed limit to fifty miles per hour. Although this subsequent remedial measure could not have been admitted as proof of the railroad's negligence, the changed speed limit was admitted to impeach the engineer on the theory that he had testified that the speed limit at the crossing in question was still ninety miles per hour. Over a vigorous dissent by Justice Schauer, the Supreme Court of California ruled that the reduction of the speed limit was properly brought to the attention of the jury for impeachment purposes.[101]

It is interesting to observe that the attorneys for the defendant railroad, which claimed to have been aggrieved by this "sly trick,"[102] failed to request a limiting instruction (admittedly, an in-

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101. Justice Schaver made the following analysis of Melvin Belli's cross-examination:

> . . . the record affirmatively shows that at no time did the witness, Benton, testify that the limitation for the crossing remained at 90 miles an hour at the time of trial . . . Morever, any confusion as to speeds, times, and districts or areas appears from the record to have been invited and brought about by counsel for plaintiffs, who then seized upon such alleged confusion as an excuse to get before the jury otherwise inadmissible evidence of a change in the speed limitation after the accident . . . it is apparent that counsel for plaintiffs, by swinging back and forth between past tense and present tense, and by discussing speed restrictions without specific indication of whether he referred to restrictions within entire railroad districts or to restrictions at a smaller area within a district (such as at the Plaza Street crossing here involved), succeeded in confusing not only Benton, the witness, but also the court itself. Counsel then seized upon the confusion which he himself had engendered, to not only bring before the jury the fact that the restriction at the Plaza Street crossing had been changed to 50 miles, but to emphasize that the change had taken place subsequent to the accident. The admission of such improper evidence could not, and did not, tend to impeach the witness, who at no time had testified that the Plaza Street intersection speed had remained at 90 miles an hour up to the time of trial; on the contrary, the witness had clearly stated that the overall restriction in the fourth district (i.e., from Fullerton to San Diego) remained at 90 miles, but he had also several times referred to "curve restrictions and other forms of restrictions" within districts — references which were plainly understood by plaintiff's counsel, who himself likewise referred to such lesser restrictions. Inasmuch as the issue of negligence on the part of defendants was close, it appears that the error of admitting such evidence of changed conditions was prejudicial.

102. The characterization is O'Connell's, *supra* note 4, at 177.

effectual instruction) directing the jury to consider the evidence of a reduction in the speed limit only as an aid to assessing the credibility of the engineer. Accordingly, they could not claim on appeal that the evidence was improperly used as proof of negligence.[103]

The propriety of such a cross-examination is subject to argument. Indeed it has been argued that since EC 7-25 declares that a lawyer should not by subterfuge put before a jury matters which it cannot properly consider, it might be unethical for a lawyer to offer limited purpose evidence he knows the jury will consider more generally in spite of the instruction of the court.[104]

V. Summation

In an earlier day, charges of misconduct during closing argument were likely to receive short shrift. As one judge opined:

> No lawyer has the right to misrepresent or misstate the testimony. On the other hand, he is not required to forego all the embellishments of oratory, or to leave uncultivated the fertile field of fancy. It is his time-honored privilege to —
>
> "Drown the stage in tears,
> Make mad the guilty and appall the free
> Confound the ignorant, and amaze indeed
> The very faculties of eyes and ears."
>
> . . .
>
> The sorrowing "grey-haired parents," upon the one hand, and the broken-hearted "victim of man's duplicity," upon the other, have adorned the climax and peroration of legal oratory from a time "whence the memory of man runneth not to the contrary," and for use at this late day to brand their use as misconduct would expose us to just unsure [sic] for interference with ancient landmarks.[105]

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103. 48 Cal. 2d at ____, 313 P.2d at 564.

104. KEETON, *supra* note 22, at 48 n.6. Under the cited provision, it would certainly be unethical for counsel to argue as substantive evidence that which the court admitted subject to a limiting instruction. *See, e.g.*, Croley v. Huddleston, 301 Ky. 580, 192 S.W. 2d 717 (1946), and text at note 112, infra.

There are, of course, other tricks in the "black bag" of cross-examination, which need not be covered in detail. On cross-examination based upon exhibits not in evidence *see* Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968); Mangan v. Broderick and Bascom Rope co., 351 F.2d 24 (7th Cir. 1965); Love v. Wolf, 226 Cal. App. 2d 378, ____, 38 Cal. Rptr. 183, 189-90 (1964). On questions directing a witness to characterize the testimony of others as true or false, *see* Ryan v. Monson, 33 Ill. App. 2d 406, 179 N.E.2d 449 (1961).

105. State v. Burns, 119 Iowa 663, ____, 94 N.W. 238, 241 (1903); *See also* Ferguson v. Moore, 98 Tenn. 343, ____, 39 S.W. 341, 343 (1897):

> Tears have always been considered legitimate arguments before a jury, and, while the question has never arisen out of any such

Notwithstanding counsel's traditional right to a certain rhetorical license in "summing-up," today's trial attorney must take care to observe his ethical obligations to the tribunal, to the opposing party, counsel, and witnesses, and to his own client.[106]

My purpose is not to restate the law of summation generally,[107] but only to present examples of violations of the disciplinary rules: the injection of irrelevant and inflamatory matter,[108] argument on the basis of facts not in the record,[109] the assertion of personal opinion or belief,[110] and the vituperation of opposing counsel and witnesses.[111]

A. Greasy Kid Stuff

Any attorney who has undertaken the defense of a large corporation or an insurance company has suffered it—the tactic that

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> behavior in this court, we know of no rule or jurisdiction in the court below to check them. It would appear to be one of the natural rights of counsel which no court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege. Indeed, if counsel has them at command, *it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises,* and the trial judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the court. (emphasis added)

But see Barzclis v. Kulikowski, 418 F.2d 869, 870 n.1 (5th Cir. 1969) (in the course of ruling that counsel's "poetry" was sour, the court stated: "We have a low opinion of the planting of this kind of corn in a federal courtroom.")

106. *Compare* Daily v. Pere Marquette R.R., 197 Mich. 340, 163 N.W. 883 (1917):

> We cannot understand how counsel will be so unjust to clients as to make arguments which counsel must know are improper, and, if they are at all familiar with the decisions of this court, also know will result in the reversal of the judgment.

107. For a more general treatment of the subject *see* Kornblum, *The Voire Dire, Opening Statement, and Closing Argument,* 23 PRAC. LAW 11 (1977); Levin and Levy, *Persuading the Jury with Facts not in Evidence: The Fiction Science Spectrum,* 105 U. PA. L. REV. 139 (1956); Comment, *Improper Argument of Counsel,* 19 ALA. L. REV. 75 (1977); Note, *Final Argument In Iowa,* 15 DRAKE L. REV. 115 (1965); Note, *The Scope of Permissible Comment In A Civil Action In Kentucky,* 58 KY. L. J. 512 (1970);

108. DR 7-106(C)(1), Model rule 3.4(e). *See also* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PROSECUTION FUNCTION 5.8(c) and DEFENSE FUNCTION 7.8(c) (Tent. Draft 1979) [Hereinafter cited as ABA STANDARDS ____].

109. DR 7-106(c)(1), Model Rule 3.4(e). *See also* ABA STANDARDS: PROSECUTION FUNCTION 5.9 and DEFENSE FUNCTION 7.9.

110. DR 7-106(C)(4); Model Rules 3.4(e). *See also* ABA STANDARDS: PROSECUTION FUNCTION 5.8(b) and DEFENSE FUNCTION 7.8(b).

111. DR 7-106(C)(6), Model Rule 3.4(e).

is somewhat charitably referred to as "dehumanizing the defendant." For example, in spite of the well established and salutary rule that the relative wealth or poverty of a party is ordinarily inadmissible, and that arguments regarding the wealth of the defendant are improper (unless about a legitimate claim for punitive or exemplary damages), deliberate incitement of bias along such lines continues to generate a surprising number of reported appellate opinions. Consider the following examples.

In *Love v. Wolf*,[112] plaintiff brought an action against a physician and a drug manufacturer for "serious and severe anemia" allegedly caused by administration of chloromycetin, an antibiotic. Reversing a $334,046.00 verdict for plaintiff the appellate court stated:

> Here it cannot be said that the wealth of Parke-Davis was relevant to any issue. Proof of its sales, however, expressed either in grams or dollars, was relevent to show a motive or reason for the alleged over-promotion of the drug, a definite issue in the case . . . but only for a proper purpose, and under instructions of the court limiting it to that proper purpose.
>
> . . .
>
> This does not mean that having elicited the evidence for a proper and limited purpose, a party's attorney may thereupon, by argument, urge its reception by the jury for an improper purpose. This is what occurred here. [Plaintiff's counsel] could have argued with propriety to the jury that a large sales volume furnished a reason or motive for over-promotion and therefore made plaintiff's evidence of the latter believable. But he could not properly argue that the jury should allow large damages because the defendant was rich or because it could well afford to be held to absolute liability as a price for marketing chloromycetin.
>
> . . .
>
> . . . Where it appears in a case that either party has purposely and designedly stressed the point of the comparative wealth of the parties, we are then presented with a question of wilful misconduct, and the case will be treated accordingly.
>
> Here the misconduct of plaintiff's counsel was first in arguing unproved profits and then in using his assertion as the basis of bias-incitement.[113]

Similarly, in *Draper v. Airco, Inc.*[114] a wrongful death action brought against United States Steel Corporation, Airco, Inc., and

112. 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964).
113. *Id.* at ____, 38 Cal. Rptr. at 189.
114. 580 F.2d 91 (3d Cir. 1978).

W.V. Pangbourne & Co., arising from the electrocution of a lineman who was installing a switch on an energized line on premises owned by U.S. Steel, counsel for the plaintiff made repeated references to the wealth of defendants and then carried on "somewhat incoherently:"

> I am going to make the equalizer between the multimillion dollar there for [Plaintiff] and her kids, it's right here. On that side of the room are bills of dollars and on this side of the room is the equalizer . . . . [I]n this case I brought you the giants, the giants of the industrial world . . . I am going to ask you to tumble the magnificent big companies here with all their engineers.[115]

A jury verdict for $585,789.55 was gained, and then lost.

A different variety of appeal to passion and prejudice permeated counsel's summation in *Edwards v. Sears, Roebuck and Co*,[116] a product liability action brought against a manufacturer and retailer of tires for a death allegedly caused by tire failure. The appellate court reversed a $450,000 award[117] relying in part on counsel's discussion of: the value of his life; counsel's personal association with the deceased; the image of children crying at graveside; and the need for retribution.[118]

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115. *Id.* at 95.

116. 512 F.2d 276 (5th Cir. 1975).

117. The Trial court had reduced a $900,000 verdict to $400,000 to cure the taint of bias and prejudice injected by counsel's summation. *Id.* at 280-81.

118. The following excerpts from the arguments of counsel were set out in the opinion:

> You will decide what is the dollar value of the loss of a husband and a father, one who earns and provides, loves, guides, comforts, consoles, protects and even punishes children. Now my partner, . . . has a little six year old boy who probably couldn't and wouldn't know enough about the value of money to know what price he might want to put on a daddy, but I don't believe my sixteen year old would take three million dollars for me — that may sound selfish, but he knows the value of money, but I believe he'd rather have me.
>
> Now I feel a heavy burden right now, and I think all of you know that. I feel the heavy burden because this young redheaded lawyer has to close this argument. This young lawyer has to say the last things that will be said for . . . , the widow of [the deceased]. And the last thing that can be said for that baby that's asleep there. And the last thing for this little girl that can be said. So I feel a heavy burden. I feel a heavy burden because [the deceased] was my friend from Seminary; that we grew up together and were friends for a long time.
>
> . . .
>
> Not one person that's been on this witness stand in nine days will approve those claims. Not one. Didn't make any tests until after . . . is dead and in the grave. My goodness, they ought to have been at the

In theory, at least, it is the duty of counsel for the parties, as well as the court, to prevent the jury from considering the extraneous and the irrelevant, and to insure that verdicts are rendered on the basis of evidence presented on issues made by the pleadings.[119] The American bar all too often appears to be preoccupied with circumventing this ideal.[120]

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grave to hear that child cry and say, "I want my Daddy" and to watch that child wait on the doorsteps of its home for its Daddy to return. But they weren't there because they had sold the tires. Maybe after this case — maybe after this one they won't be able to make those claims. Maybe there won't be many more children sitting on the doorstep waiting for Daddy to come home, and he never comes home because they couldn't back up what was in that Owner's Manual.

. . .

Now I say to you when every expert says you ought to have four more p. s. i. above 75, and Sears says you ought to have only 24 up to 100, and I say to you when they make the 40,000 miles at 110 miles a lie without failure tread body would separate — when they say those things to you they're playing games — with human life. And they played a ruthless, horrible, mistaken game on [the deceased]'s life. Why? For the sale of tires. Put that air pressure down there 24 so they'll ride soft and you'll sell them tires. Put those ads on the television. Put those pamphlets out without any claim. Playing games with human life — except it caught them in this case. It caught them in this case.

I say to you they got the profit off the tires. Pay the lady and the children for his death. Pay the children and the lady for his death — for his thirty-three productive years . . . . They'd rather have him here. But they don't, so pay them. Pay them. So that Sears would remember and Michelin would remember that the next time they write something down they'd be able to half way back it up.

119. Hockaday v. Red Line, Inc., 174 F.2d 154 (D.C. Cir. 1949). *See also* Cherry Creek Nat. Bank v. Fidelity & Cas. Co., 207 A.D. 787, ____, 202 N.Y.S. 611, 614 (1924):

> The rule confining counsel to legitimate argument is not based on etiquette, but on justice. Its violation is not merely an over-stepping of the bounds of propriety, but a violation of a party's rights. The jurors must determine the issues upon the evidence. Counsel's address should help them do this, not tend to lead them astray.

120. *See, e.g.*, J. O'CONNELL, THE LAWSUIT LOTTERY, *supra* note 3, at 27-28:

> The reasons punitive damages are often asked for although very rarely enacted are illustrative of the manipulative, deceptive, subterranean world of tort litigation. Plaintiffs' lawyers request them . . . (1) to inflame the jury against the defendant by the very terms of the accusation, regardless of whether the defendant's conduct in fact justifies the accusation; . . . (3) to get evidence of the defendant's income and net worth before the jury, supposedly to help it decide how big a verdict will "punish" him, but in fact to implant the idea of the defendant's wealth; . . . .

B. Bushwacking

"Bushwacking" is a term that at least one court has used in describing arguments presenting facts outside of the record.[121] The term is particularly appropriate when a trial attorney resorts to his own assertions of fact and substitutes his testimony as proof, denying the opponent an opportunity to interpose objections based on exclusionary rules, or test the evidence through cross-examination.[122]

For example, a crucial issue in *Edwards v. Sears, Roebuck and Co.*,[123] was the amount of air pressure necessary to assure safety at speeds in excess of 75 miles per hour in tires manufactured by the defendant. Plaintiff presented evidence to prove that a tire pressure recommended in defendant's owner's manual was not supported by actual tests as claimed. In closing argument plaintiff's counsel embellished his case by telling the jury that a Sears representative had testified that the company knew its recommendations were false and had therefore taken them off the market after the deceased's death. The Court observed that the admission attributed to the witness not only was unsupported by the record but also would have been excluded at trial as a subsequent remedial measure.[124]

C. Personal Opinion Or Belief

Closely related to the rule limiting argument to the record is the rule stated in DR 7-106(C) that:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> . . .
>
> (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
>
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil

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121. Smith v. Wright, 512 S.W.2d 943, 947 (Ky. App. 1974).

122. Levin and Levy, *supra* note 106, at 144-45. Often such references are also irrelevant and inflammatory. *See, e.g.*, Williams v. Alaska, 629 P.2d 54, 58 (Alaska 1981) (references to hung jury in previous trial).

123. 512 F.2d at 285-6 nn. 10-13.

124. *Id.* at 284-85. *See also* Draper v. Airco, Inc., 580 F.2d 91, 96 (3d Cir. 1978) (condemning counsel's reference to his meetings and discussions with the deceased's children, none of whom had testified); Rommel-McFerran Co., v. Local Union No. 369, 361 F.2d 658 (6th Cir. 1966) (citing as reversible error argument that union's conduct in a deposition had not been introduced and admitted in evidence).

> litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters herein.

Among the conventional justifications for the no-personal-belief rule are:

> First, an attorney's statement of his beliefs impinges on the jury's function of determining the guilt or liability of the defendant. Second, and more important, an attorney's statement of his beliefs injects into the case irrelevant or inadmissible matter or facts not legally produced into evidence. By giving his opinion, an attorney may increase the apparent probative force of his evidence by virtue of his personal influence, his presumably superior knowledge of the facts and background of the case, and the influence of his official position. If, for example, an attorney states in his summation that he believes a witness has lied, his statement suggests that he has private information supporting his beliefs.[125]

By anyone's count, this is surely the most frequently violated rule of ethics and argument.[126]

The most blatant breaches of the no-personal-belief rule occur in criminal cases when either the prosecutor or defense lawyer makes an uninvited statement regarding his knowledge of or belief in the defendant's guilt or innocence.[127] More frequent and perhaps more innocent violations arise from efforts to discredit or accredit the

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125. United States v. Morris, 568 F.2d 396, 401-02 (5th Cir. 1978). *See also* EC 7-24 ("... were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client.").

126. *Cf.* D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 260 (1973).

127. State v. Vickory, 205 N.W.2d 748 (Iowa 1973) (prosecution in opening statement); State v. Monroe, 236 N.W.2d 24 (Iowa 1975) (prosecution in closing, opined" ... I do believe that the man is guilty, and that you should, in fact, render a verdict of guilty for him."). For a more subtle approach *see* United States v. Bess, 593 F.2d 749, 753 (6th Cir. 1979) ("If the United States did not believe the defendant was guilty of committing these charges in the indictment, based on the evidence that has been presented to you, this case, of course, would have never been presented to you in the first place. It never would have been presented to you."); Telfare v. State, 163 Ind. App. 413, 324 N.E.2d 270 (1975) ("... I swore I would ... prosecute those who commit crimes, but I feel my job is also to protect the innocent (inaudible), and I stand before you today with a clear conscience."); State v. Henderson, 226 Kan. 726, 603 P.2d 613 (1979). *See also* Commonwealth v. Stevenson, 482 Pa. 76, ____, 393 A.2d 386, 390 (1978) (defense counsel's reference to himself (and his client) as "the good guys").

Similar conduct has been known to occur during voire dire examination of prospective jurors. *See* Hawk v. Superior Court, 42 Cal. App. 3d 108, ____, 116 Cal. Rptr. 713, 719, 722, n.13 (1974) (references to appearance of psychologist at no cost to defendant because of psychologist's belief in defendant's innocence, and references to counsel's friendship and affection for the defendant justified finding of contempt).

testimony of witnesses. Indeed, many of the following comments of counsel might be viewed as common, and perhaps acceptable, by the casual observer:

> Quite apart from Mr.____'s testimony, there is the testimony from the aliens and there is the testimony from the Government officers who have no interest in this case other than seeing that they are upholding their sworn duty to see that the laws are not violated and that individuals such as [defendant] who violate these Federal laws are brought to justice.[128]

> Now after [defendant] has been caught in this rather apparent contradiction, the lie, he didn't have the beer pitcher . . . .
>
> . . .
>
> If on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable — ladies and gentlemen, I don't believe [defendant's] story, too many coincidences, too many slips and slides around the facts.[129]

Perhaps the line is too fine that permits the prosecutor to state "I believe that the evidence has shown the defendant's guilt,"[130] but prohibits him from stating "I believe that the defendant is guilty"; or that invites him to opine that "No conflict exists in the testimony of the prosecution's witnesses,"[131] but precludes him from stating "The prosecution's witnesses are telling the truth."[132] However, the following comments are clearly inappropriate in civil suits as well as criminal cases:

> And I tell you, ladies and gentlemen, that she is an incredible witness, and she is not worthy of your belief. She is a liar, clear and simple.[133]

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128. United States v. Morris, 568 F.2d at 400 (improper aggrandizement of the credibility of government offices; but error harmless).

129. State v. Garcia, 100 Idaho 108, ____, 594 P.2d 146, 148 (1979) (harmless error).

130. United States v. Wayman, 510 F.2d 1020, 1028 (5th Cir. 1975).

131. United States v. McDowell, 539 F.2d 435, 438 (5th Cir. 1976).

132. United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972).

133. Dukes v. State, 356 So.2d 873, 875 (Fla. App. 1978). In Olenin v. Curtin & Johnson, Inc., 424 F.2d 769 (D.C. Cir. 1968), a personal injury case, the court observed in its per curiam opinion:

> It is unprofessional conduct, meriting discipline by the court, for counsel either to vouch for his own witnesses or to categorize opposing witnesses as "liars"; that issue is for the jury . . . we "must rely primarily on the trial judges to make clear that they do not want such argument," and we further pointed out that "disciplinary

> As I say, I have been making final arguments for 16 years, and I can't remember ever using this word before in a final argument — lied. She lied to you.[134]
>
> He lied to you, ladies and gentlemen. Why did he do that? Why did he make that story up?
>
> . . .
>
> So why is he lying to you? It's just like Johnny lying about not delivering the newspapers. Johnny would lie, and that's because he took the snow shovel and tried to put it off on to somebody else.
>
> . . .
>
> When the defense put on its case, it was filled with falsehood, not a grain of truth in this defense, ladies and gentlemen.
>
> . . .
>
> We are not basing our argument simply on the fact that he was there, as Mr. L____ said, but he was there and he lies about where he was . . . .[135]
>
> [The youth's] testimony is pretty incredible when you think of it.
>
> . . .
>
> Why did it take him so long to answer? — because he was making the testimony up while he was sitting here.[136]

D. The Brawlers

The media at times appears to idolize the "street-fighter," and laymen who would ordinarily have nothing good to say about lawyers in general, all want one by their side when their lives or cash are at stake. Even so, the brawler's techniques, particularly the deliberate abuse of opposing counsel, have no place at trial:

> All of these matters rest within the control of the trial court, and the trial court has the power and duty to preserve decorum. The trial court can and should institute contempt proceedings against recalcitrant counsel and impose either a fine or jail sentence.[137]

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mechanisms are available to the trial courts to deal with unlawyerlike behavior."

Compare Compagnie Nationale Air France v. Port of N.Y. Auth., 427 F.2d 951, 956 (2d Cir. 1970).

134. State v. Williams, 297 Minn. 76, ____, 210 N.W.2d 21, 24 (1973).

135. Dyson v. United States, 418 A.2d 127, 130 (D.C. 1980).

136. *Id.* With regard to this comment, the court explained:

> Characterizing testimony as incredible is an accepted and proper form of comment on contradictory testimony. But, the prosecutor exceeded the bounds of permissible comment by invading the province of the jury's responsibility to assess the demeanor of witnesses when he characterized the witness' pause as an opportunity to fabricate.

137. Eizerman v. Behn, 9 Ill. App. 2d 263, ____, 132 N.E.2d 788, 799 (1956).

The Code of Professional Responsibility provides in DR 7-106(C)(6) that "counsel should not engage in undignified or discourteous behavior."[138] Consider the propriety of the following exchanges in light of this standard.

Counsel approaches the defense table, and pointing out the defense attorney, says:

> I charge Mr. ____ [attorney for Airco] who had the mental poor guy with no brain in there. I charge him, head of a $7,400,000 contract. I charge him as part of the same conspiracy. And I charge Mr. ____ [attorney for Pangborne] who didn't have the decency to put a rubber blanket around it or platform [sic] or anything else.
> [And to imply that the same counsel had deliberately "deep sixed" requested documents.]
> Every time we get to a crucial spot, things disappear.[139]

Equally enlightening are the following remarks by an appellate court:

> Counsel's vilification and abuse of opposing counsel was reprehensible, although its effect to influence the jury was no doubt less prejudicial. Counsel for Parke-Davis was referred to as "an idiot" (several times), a "smart guy," a "laughing hyena." When counsel objected to [counsel's] obviously-improper reference to Parke-Davis' "astronomical profits," [counsel] replied: "Can I make a statement or two without being interrupted, or do I have to floor you, . . .?" This was one of several similar expressions made to one or another opposing counsel who were also invited to "Step outside and do something

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138. *Compare* Model Rules 3.5(c) and 4.4.

139. Draper v. Airco, Inc., 580 F.2d at 96. *Compare* Cecil v. Gibson, 37 Ill. App. 3d 710, ____, 346 N.E.2d 448, 449 (1976).

> In his closing argument defense counsel characterized plaintiffs' attorney as a "slick attorney from Chicago." Defense counsel referred to plaintiffs' attorney as a "slick hired-hand" and also referred to plaintiffs' medical expert witness as a "sidekick" and a "righthand man."
>
> Defense counsel claimed that plaintiffs' counsel "manufactured" evidence, had a "wild imagination," and was not worthy of the jury's trust. He further stated that plaintiffs' counsel was the "captain of (the) ship" who was "piloting" the testimony of plaintiffs' expert witness. In addition, defense counsel compared the relationship between plaintiffs' counsel and his expert witness to that existing between the "Cisco Kid and Poncho" and "Mat Dillon and Chester." The expert was characterized as "a professional witness" who carries a "shiny black leather bag" containing instruments that "have never been used."

See also Ryan v. Monson, 33 Ill. App. 2d 406, ____, 179 N.E.2d 449, 458 (1961); and J. GOULDEN, THE MILLION DOLLAR LAWYERS 85 (1977) (dealing with attacks on expert witnesses).

about it." Their objections were characterized as "asinine" and as "hogwash." They were accused of suborning perjury. When defendant Wolf's attorney complained that he could not see the witness (apparently because [counsel] during cross-examination had placed himself between counsel and the witness) plaintiff's counsel asked if the attorney was passing signals to the witness.

Opposing counsel, voicing objections, were frequently told to "shut up" and the attorneys representing the several defendants who, of course, had sometimes identical and sometimes widely contrapositive interests on separate issues were accused of "sleeping together."[140]

Conclusion

No author can hope to provide more than an introduction to the subject of unethical practices at trial. Nor is it my intention to suggest that the disciplinary docket will, or should, be crowded with cases charging infractions of the disciplinary rules cited, or other customs of proper court procedure. Many of the "dirty tricks" that occur are simply the result of ignorance and inexperience.[141] On the other hand, it is the author's hope that a primer on the subject will provide the beginner with an opportunity to learn from the mistakes of others, and provide trial attorneys and judges with a guide to help them spot, and respond to, deliberate and recurring abuses.[142]

In addition, it is hoped that more trial judges will recognize and exercise their inherent power to insure that litigation is conducted in a fair, efficient, and sensible fashion,[143] by dealing sternly with such unfair tactics through the imposition of costs and money sanctions[144] and exercise of the contempt power,[145] to discourage calculated violations of the disciplinary rules.

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140. Love v. Wolf, 266 Cal. App. 2d at ____, 38 Cal. Rptr. at 190. According to the appellate court, the trial judge failed to protect defense counsel:

> Excepting one mild characterization of conduct by counsel as "a little bit disgraceful" (made in such a manner that a reader of the transcript is left uncertain at which attorney the criticism was directed) and several expressions of disgrace such as, "Let's all go home. What do you say we all go home," there was almost no effort to keep the proceedings within the confines of propriety.

141. *Cf.* Ordover, *The Lawyer as Liar*, 2 AM. J. TRIAL ADVOC. 305, 314 (1979). Any instructor of trial advocacy or "litigation skills" will spend a good portion of each class session pointing out improper questioning techniques, and improper arguments in opening statements and summations.

142. *See, e.g.*, text at nn.50 and 70.

143. *See, e.g.*, Control Data Corp. v. Washington Metropolitan Area Transit Auth., 87 F.R.D. 377 (D.D.C. 1980).

144. *See, e.g.*, Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1978); *In re* Sutter, 543 F.2d 1030 (2d Cir. 1976)

145. United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981). *See also* text at n.138, *supra*.