

CTexas Tech Law Review 1999

*1343 THE PROFESSIONAL DUTY TO HORSESHED WITNESSES-ZEALOUSLY, WITHIN THE BOUNDS OF THE LAW

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Instead of proceeding chronologically, historically, or thematically, I have chosen to organize my thoughts around a series of caveats, disclosures, and disclaimers. These points frame the issues nicely and blend into the substance of what I want to convey about the topic. Thus, they can serve as a substitute for a more traditional organizing scheme.

First, I disclaim the implicit message of the pre-Symposium publicity, the Symposium program, and the Symposium format. The suggestion is that academicians will open the proceedings by presenting a strictly theoretical framework for discussing witness preparation, and then turn the podium and the pages of the symposium issue over to the practicing lawyers for some "real world" wisdom. It is true, of course, that both Professor Silver [FN1] and I are legal academics who work in the field of legal ethics, more broadly referred to nowadays as "the law of lawyering." [FN2] But it is also true that I would not have been invited by the Symposium organizers to participate, had I not also been involved as a lawyer in a particular piece of actual, real-world, high-stakes *1344 litigation. [FN3] Not coincidentally, that litigation was litigation in which witness preparation-the subject of the Symposium-occupied center stage. [FN4]

I. The Infamous "Preparing for Your Deposition" Document

The Dallas law firm of Baron & Budd represented thousands of individual workers-or their survivors-in suits against the manufacturers of asbestos products that had been used on jobsites and in workplaces during the past fifty or more years.

[FN5] As is now well-known, exposure to even small amounts of ambient asbestos fibers can cause asbestosis, which scars and constricts the lungs, and mesothelioma, a particularly painful and deadly form of cancer. [FN6] Sustained exposure to large quantities of asbestos fibers, especially fibers that are loose and floating free rather than bound into a more stable compound, is especially lethal. [FN7]

By the mid- to late 1990s, most of the more obvious and severe cases of exposure to the most dangerous types of asbestos had been litigated to a conclusion or settled. [FN8] Several of the largest manufacturers of asbestos had gone into bankruptcy or reorganization, in many cases leaving behind trust funds to pay further claims as they accrued. [FN9] Most of the remaining Baron & Budd clients were elderly, and many were either illiterate or had limited education. [FN10] Moreover, their exposure to asbestos was not always as clear-cut as in the dramatic and classic cases of workers literally winding their way through clouds of loose asbestos dust. [FN11]

*1345 In the contemporary cases, the defendant manufacturers and their insurance carriers were often willing to settle, but usually only after taking the deposition of the individual client or his family and coworkers. [FN12] At each deposition, the critical issues were establishing what level and type of exposure the claimant had had to various kinds of asbestos products, and establishing which manufacturers were responsible for marketing each product so identified. [FN13] Moreover, in order to test the ability of the claimants to recollect the details of their alleged exposure, the defendants typically insisted that Baron & Budd clients testify without the benefit of notes or charts or other memory aids. [FN14]

In response, a paralegal worker for Baron & Budd developed a detailed set of instructions and worksheets for use in interviewing clients and preparing them to testify; it was titled Preparing for Your Deposition. [FN15] The twenty-page document began with about ten pages on which the client would fill out a detailed work history and history of exposure to various kinds of asbestos at each jobsite. [FN16] Included on those pages, but also throughout the rest of the document, were detailed explanations of the kinds of information that would be most helpful to the plaintiff's case, and detailed suggestions-including specific wording-about how to testify most effectively. [FN17] There were also tips about dealing with the insurance company's lawyers, reminders about the role that Baron & Budd lawyers would play in the deposition, and tips on memorization techniques. [FN18] A long concluding section reminded workers of many of the elements that could figure in assessing damages, such as fatigue, out-of-pocket expenses for household help, shortness of breath, and loss of sexual enjoyment. [FN19] An actual filled-out copy of the document, in a client's handwriting, is available on the Internet. [FN20] Some excerpts from the document-largely the ones that were *1346 featured most prominently in the subsequent national press coverage-are available from a loose-leaf service publisher. [FN21]

In August 1997, a novice Baron & Budd lawyer in Corpus Christi allowed a copy of Preparing for Your Deposition, which soon became known as the "Deposition Document," to fall into the hands of insurance company lawyers. [FN22] Although the document was clearly marked "Attorney Work Product" on the first page, the young lawyer did not object when defense counsel asked one of the firm's clients to turn it over during his deposition. [FN23] Almost immediately, the law firm's practices in preparing witnesses for testimony came under scrutiny and under attack. [FN24]

Insurance company lawyers tried to use the document as evidence of perjury and subornation of perjury in hundreds of individual cases in Nueces County, where Corpus Christi is located, and elsewhere. [FN25] In each venue, the defendants sought dismissal or stay of the cases, disqualification of the Baron & Budd law firm, and the right to take discovery to learn more about the Deposition Document and its use. [FN26] The legal press and other local and national media provided significant news coverage, [FN27] some other media outlets carried feature stories on witness preparation generally, [FN28] and still others published strident attacks. [FN29] Both state and federal grand juries considered whether there was evidence of criminality, and a state judge referred the matter to the Texas disciplinary authorities. [FN30]

The Baron & Budd law firm hired other lawyers to defend it in all of these fora, and those lawyers engaged my services as a consultant and expert witness. I was to provide help assessing the impact of the law of lawyering on the case, including the attorney-client privilege and the work product rule. If I concluded that use of the Deposition Document was appropriate-which I did-then I would so testify as an expert witness. [FN31] Even from that partisan *1347 vantage point, however, I was readily able to see that depending on what conversations and perhaps even what body language attended use of the work-

sheets, they could have meant different things to different clients. And they could have led to dramatically different testimony.

As critics charged, the Deposition Document worksheet could have been used as a script for carefully fine-tuned perjury about events that never took place and recollections that were implanted but never actually recalled. [FN32] Assuming that to have been the case, Walter Olson of the Manhattan Institute, writing in the June 1998 issue of Reason Magazine, titled his article Thanks for the Memories. [FN33] He linked the Baron & Budd document with the "talking points" document that someone gave to White House aide Linda Tripp, suggesting that her original account about Kathleen Willey's exit from President Clinton's inner sanctum-lipstick smeared and blouse untucked-was in need of a rewrite. [FN34] He claimed that both documents constituted evidence of "just how breezy our legal culture can be about the suborning of perjury." [FN35]

But was use of the Texas witness preparation document necessarily the equivalent of suborning perjury? Hardly. The document-especially the first ten pages of worksheets-could just as easily have been used as a streamlined protocol for getting actual work histories down on paper, some stretching back as much as forty years. [FN36] With those basics out of the way, the client and the *1348 lawyer could work to piece together the detailsof who was exposed to which products. Moreover, the "directed" or "scripted" approach of some of the later passages of the document, [FN37] the ones that enraged the defendants and other critics the most, [FN38] could simply have been fairly standard attempts to ensure that the unsophisticated clients would later be able confidently and effectively to present their truthful testimony under pressure.

The same uncertainty of purpose and effect accompanies many of the specific reminders to clients appearing throughout the document. [FN39] Take, for example, the reminder to clients that the insurance company lawyers were very young, were not present at the jobsites in question, and had no records of the specific products used. [FN40] In his article in Reason Magazine, Walter Olson saw this as cynical advice to "quit worrying" about opposing lawyers who might begin to get skeptical at all those memories, a signal to clients that it was safe to lie. [FN41] However, the passage could simply be encouragement not to be bullied by trick questions designed to make elderly retired workers doubt their own actual recollections-which is what the Baron & Budd document stated was the point. [FN42]

*1349 Preparing witnesses through active coaching and rehearsal-the asbestos workers had earlier been shown "picture books" of asbestos product labels and had been urged to have family members quiz them using flash cards-is known among trial lawyers as "horseshedding." [FN43] Even if I had encountered that earthy term for the first time as a pure academic, rather than as a practicing lawyer, I would no doubt have appreciated its self-conscious and sardonic cast. Even academics, after all-even if they hail from big cities-know what is in most abundant supply in a horse shed! But how do we know when the result of a session in the horse shed is refreshing recollection, and when it is prompting perjury? [FN44]

Often, as I advised my clients and testified in the Corpus Christi case, we cannot know. And with respect to the solitary use of Baron & Budd's horseshedding document that was specifically at issue in that case, there was even less possibility of knowing or proving whether it had been used properly or corruptly. Without more, the horseshedding document did not even suggest perjury by the particular client involved in the controversy. [FN45] Thus, without more, its use by lawyers and paralegal workers from the Baron & Budd law firm could not be criminal or unethical either. [FN46]

Furthermore, because of the attorney-client privilege and the work product rule, it would be difficult for either an opponent in litigation or enforcement authorities to obtain the "more" necessary to make out a case. [FN47] *1350 Finally, I opined that failure to engage in some level of horseshedding would be unethical and unprofessional, bordering on legal malpractice to boot.

The trick, of course, is judging how far to proceed along the spectrum that I have already conceded runs from refreshing recollection all the way to prompting perjury. Journey not far enough, and a lawyer deserves sanction for failing to carry out the most basic duties encompassed by the client-lawyer relationship. [FN48] Go too far, and a lawyer has strayed into sanctionable and perhaps criminal territory. [FN49] That is the point of the title of this Essay: "The Professional Duty to Horseshed Witnesses-Zealously, Within the Bounds of the Law." [FN50] But it also leads to my second disclosure and disclaimer.

*1351 II. Interested Testimony and the Calculus of Credibility

I was paid for my involvement in the Corpus Christi asbestos case, and the affidavit I wrote was clearly an advocacy document designed to persuade the court that Baron & Budd's witness preparation techniques were not beyond the pale. [FN51] My testimony, in other words, was no more disinterested than that of the plaintiffs who had been horseshedded by Baron & Budd in the underlying asbestos cases. Accordingly, the court hearing the case, as well as the audience at the live Symposium and readers of this essay, would be justified in taking that into account in assessing the validity of what I have to say. [FN52]

*1352 Moreover, to make matters worse-or at least more ironic-the lawyers representing the Baron & Budd law firm (and thus representing as well the plaintiffs in the asbestos cases) also horseshedded me. They knew in advance (from press interviews and prior conversations) that I was amenable to taking a stance that was favorable to their clients' cause, but they needed to ensure that my testimony was as effective as possible. [FN53] As a further twist, because I was engaged not only as an expert witness, but also as a lawyer and a consultant, part of my assignment was to advise the lawyers about strategy. I discussed with the lawyers what testimony would be most helpful if they could "elicit" it from me and thus, in effect, participated in my own horseshedding. [FN54]

In his article in Reason Magazine, Walter Olson ridiculed my affidavit as part of the cover-up of the client and lawyer crimes that he thought had already occurred. [FN55] Implicit in his attack was the charge that I simply manufactured testimony of my own to fit the needs of my paymaster. [FN56] The *1353 "affidavit deserves an acid-free mount and mahogany frame," he wrote. [FN57] "How better to sum up the degree of moral insight and ethical rigor that America's legal academy expects of its members?" [FN58] It was easy for Mr. Olson to make that assessment, because he had already assumed that merely showing a client the Deposition Document was unethical. [FN59] In his view, it was a per se violation of the ethical rule against counseling or assisting a client to commit crime or fraud. [FN60]

As noted earlier, my assessment of how the ethical rules should-and would-be applied to the precise facts at hand differed from Mr. Olson's. [FN61] And I am confident that my testimony-though coached-was truthful: what I swore was my opinion was my actual opinion, not merely something convenient to the needs of the case at hand. But I do concede that there is no obvious way of proving that proposition to Mr. Olson or to anyone else. Indeed, that is the point of my second disclaimer-no one can be sure that what I say or write, even today, was not influenced by the money I was paid.

That is a chief difficulty of the adversary system generally-distinguishing zealous advocacy from legalized prostitution, and interested testimony from lies. That, in turn, brings us back to the rehearsed testimony of the asbestos workers. [FN62] As in the case of my testimony, we cannot be sure that the money-in their cases a better settlement-did not taint their testimony either. Similar skepticism is appropriate for all other testimony that is not disinterested-which means essentially everything that is not coming from the mouth of a fortuitous bystander-witness.

Skepticism, however, is not the same as cynicism, just as partisan presentation of factual evidence is not the same as bad faith or perjury. Whether listening to a Symposium speaker or reading an essay, reading affidavits in chambers or sitting in a jury box, everyone is called upon to make judgments about credibility. But that judgment must be based on the totality of the clues that are available, both positive and negative, rather than the facile assumption that everyone with an incentive to lie will actually lie.

Confronted with my views on the Deposition Document, for example, a conscientious observer might engage in the following internal dialogue. The professor was paid for his testimony, and he even helped plan what questions he would be asked. [FN63] The lawyers in the case no doubt helped write the *1354 affidavits he submitted. [FN64] But he seems to have a good reputation for integrity, and the other side never caught him in an inconsistency or showed that he had ever been accused of slanting testimony in other cases. Furthermore, although he dutifully testified favorably for the side that was paying him, he was willing to concede that there might be "troubling" details in the document, [FN65] so he was not trying to sweep

everything under the rug. Most important, he took basically the same position when he was interviewed by the media, before anyone offered him money. [FN66]

Switch to a typical Baron & Budd client, and the same kind of mental dialogue should be played out. The man says he remembers seeing the actual names on the bags of asbestos products. But that is what his lawyer told him he had to say in order to win. Plus, he was shown pictures of most of the products that were at issue. But could he have remembered that kind of detail without being shown pictures? Most of his work with those products took place at least twenty years ago, and some of it a lot more than that. Furthermore, all the other people who worked at the same shipyard remembered those same names. This could mean that the lawyers coached all of the clients to "remember" the exact same details, but that kind of a well-planned and flawlessly executed criminal conspiracy is almost impossible to believe.

This algebraic sum of credibility plays out after the horseshedding has taken place, and we all are entitled to take that into account and impose a large or a small discount on coached testimony, as we see fit. But how does it look to the lawyer in the horse shed? How does the lawyer judge when the very process of horseshedding is simply part of zealous representation, and when it crosses the line into active facilitation of perjury? Professor Monroe Freedman long ago gave the best testing scenario. [FN67]

In adjoining States X and Y, he postulated, many workers' compensation cases involve workers who have hurt their backs. [FN68] In State Y, almost all of the claimants testified that they tripped or slipped just before the injury, while virtually none so testified in State X. [FN69] This is fortunate for the claimants, because in State X any on-the-job injury is compensable, whereas in State Y there must be an accompanying "accident" of some kind. [FN70] Professor Freedman is not naive, and he recognized that the only way to explain the systematic difference in testimony was that lawyers in State Y were informing their clients about this quirk in the law. [FN71] Moreover, the clients were being *1355 educated about the elements of a winning claim precisely at the moment that they were trying to reconstruct what happened. [FN72]

Not being naive, Professor Freedman accepted the follow-up point as well that there is a risk that a certain number of quick-witted but unscrupulous State Y clients will "remember" a slip or a trip that did not really happen. [FN73] "Thanks for the Memories" indeed, and score a point or two for Mr. Olson's theory about our legal culture's lackadaisical attitude towards suborned perjury. [FN74]

But suppose that clients in State Y are not given the (accurate) information about the state of the law. [FN75] There is an equal or greater risk that clients who really did trip or slip will not tell their lawyers about it. [FN76] Perhaps they will subconsciously suppress the fact, out of embarrassment or out of misplaced fear that it might seem as if they were not paying attention and thus did not deserve compensation. [FN77] More likely, it will be because without being prompted, they will simply not advert one way or the other to how the injury occurred. [FN78] The points awarded in the abstract to Mr. Olson must now be deducted again, it would seem, especially given the fact that the dilemma does not play itself out in the abstract.

How, then, does the practical, ethical lawyer decide which of the two risks to incur? Make full disclosure and risk prompting perjury, or withhold information from the client and risk destroying a good claim? In our adversary system, the choice should be easy. Once the lawyer has agreed to take the case, the duty of zealous representation should dictate giving the client the benefit of the doubt. [FN79] Moreover, the lawyer should trust the client all the way up to the point of knowledge that the client is up to no good. [FN80] The *1356 lawyer should have the professional skill and courage to present the strongest case possible, even if the lawyer is not one hundred percent convinced of its soundness. [FN81]

To put the matter more bluntly, our adversary system holds that the litigating lawyer is supposed to act-playacting, if need be-as if the client ought to prevail. [FN82] Moreover, the litigating lawyer must play this role to the hilt, so long as the client's cause is not frivolous, and the evidence supporting it is not known to be false. [FN83] Thus, contrary to one of our grandest myths, the aim of the advocate is not to determine the truth or even to lead the factfinder towards the truth. [FN84] The point is to win the case-within the bounds of the law-even if that requires maneuvering the trier of fact ever further from the truth. [FN85] This, in turn, means that "the bounds of law," as they are currently understood, sanction a broad array of

truth-defying and obscurantist tactics. [FN86]

This view of the adversary system is common ground between critics and defenders of the system. The critics and the defenders differ only to the extent that they decry or applaud this reality. [FN87] Walter Olson, a fierce and persistent critic of the adversary system, is not naive either. [FN88] He is as aware as I am that lawyers are supposed to distort the truth-if they need to in order to win so long as they can do so without lying or facilitating the known falsehoods of others. [FN89] Thus, his attack on the Baron & Budd law firm and its witness *1357 preparation practices, as well as his attack on me, are all merely small-arms fire in a larger war on the adversary system itself. [FN90] That leads to my final disclosure or confession.

In the past few years, I have become more and more concerned that the elite strata of the bar-by which I mean to include judges and law professors, along with big firm transaction lawyers-have abdicated their responsibility as keepers of our adversary system. [FN91] Elite lawyers are eager to decry the decline of "professionalism" among other lawyers, but often lack even a meaningful definition of the term. [FN92] Upon closer scrutiny, moreover, it often appears that "lack of professionalism" in the eye of one beholder is uncompromising and unapologetic loyalty to client interests in the eye of another. [FN93] Thus, the movement promoting professionalism, civility, and "the spirit of public service," [FN94] often degenerates into an attack on those who prefer client service to public service, and are not afraid to play hardball in the process. [FN95]

*1358 More often, elite lawyers cause harm to the adversary system indirectly, simply by failing to come to the defense of lawyers embroiled in controversial cases-the O.J. Simpson case merely being the most obvious recent example. [FN96] The organized bar could have used these cases to educate the public about why lawyers must make moves that seem unjust and even smarmy in the short run, in order to sustain the rule of law for the long run. [FN97] Instead, bar leaders and opinion makers turned their backs, thus acquiescing in and adding to the lawyer-bashing prevalent throughout our society. [FN98]

*1359 With this disquieting background in mind, my chief purpose in talking to the media about the Baron & Budd case, and my chief motive in agreeing to participate as a consultant and as an expert witness, was educative. Wearing my professional rather than my private citizen hat, I sought to provide a small counterweight to the harmful silence of the organized bar generally. The same is true of my participation in the Symposium at Texas Tech University School of Law. [FN99] Thus, it was not for the money after all-which means that I might have dispensed with my second disclaimer altogether!

III. Truth, the Whole Truth, Courtroom Truth, and the Adversary System

The outcry over the Deposition Document used by the Baron & Budd law firm to horseshed its asbestos case clients was only partially about the possibility that it might prompt full-throated perjury. [FN100] It is highly unlikely, for example, that a swindler who had never worked with asbestos would manufacture an entire fictitious work history, complete with false memories of specific jobsite tasks that required wading through piles of loose asbestos. [FN101]

The more realistic concern was that basically sound claims would be massaged to make them stronger than they really were, and that basically truthful testimony would be polished to make it more credible and more compelling than it deserved to be. [FN102] In this connection, critics made two distinct types of claims. First, they charged that clients were being told to withhold relevant information-lying by omission. [FN103] Second, there was a perceived danger that the process of horse-shedding would turn a client's dim (but not false) memories into overly confident statements of fact-lying by embellishment. [FN104]

Does horseshedding at that level of detail cross beyond the bounds of law? My answer, both as a paid expert witness and as a defender of the adversary system, is that it does not always cross the line. But a complete and *1360 particularized answer to whether the Deposition Document was proper or improper again depends upon exactly how each sentence and phrase was explained to the clients and understood by them. Again, however, we are left to fall back on some speculation, because of the veil of secrecy provided by the attorney-client privilege and the work product rule. [FN105] Still, it is possible to make some slightly more concrete observations about the boundary line between permissible and impermissible horseshedding,

[FN106] using examples from the Baron & Budd case.

With respect to distortion of the truth though omission, the rules of engagement in our real-world adversary system contemplate that each side will put its own best foot forward. [FN107] The advocate's goal, after all, is to present a winning case, not a neutral report that covers all of the bases and makes the maximum contribution to revelation of the truth. [FN108] If there is evidence that weakens the case, the other side will be only too pleased to bring it forward. Thus, the choice of what material to present and what to omit is a crucial aspect of every litigating lawyer's overall advocacy effort, and the resulting "courtroom truth" [FN109] need not match every chapter and every verse of objective truth. [FN110]

*1361 For this reason lawyers never counsel witnesses to tell "the whole truth." Witnesses are instead told-as they should be-to tell the truth in response to whatever questions are asked. The lawyer will then be careful to ask only such questions as will elicit truthful-but-favorable answers. If the other side's lawyer fails to ask questions that will result in truthful-but-unfavorable answers, that is the other side's misfortune, for which the proper remedy is a suit for legal malpractice, not an attack on the first lawyer.

The Baron & Budd Discovery Document was on solid ground in this area and contained an exemplary discussion that should have been easy for lay persons to understand. [FN111] After fairly standard admonitions to listen to opposing counsel's question carefully, and not to volunteer information, the Discovery Document gave as an example the possible question, "[Do] you know what products Johns Manville made[?]" [FN112] As the Discovery Document then noted, the correct answer must be either "YES" or "NO." [FN113] An answer such as "yes-it makes insulation" is simply not responsive to the question that is actually pending. [FN114] Of course, if the questioner follows up with a question asking for such information, the witness is obligated to provide it, if known, as the Discovery Document also appropriately reminded Baron & Budd clients. [FN115]

Or consider the admonition in the Deposition Document, "Do NOT mention product names that are not listed on your Work History Sheets." [FN116] If this advice was accompanied by the proviso, stated or implied, "even if there were such products, and even if you are asked," then the advice would obviously be improper, for that would call for a lie. [FN117] But if the true meaning of that paragraph was not to mention other products "unless asked, on direct or cross-examination," then the advice was not only proper, but also vital. *1362 Furthermore, the advice is essentially identical to the advice contained in a document that Baron & Budd clients were also shown-a document written by insurance company lawyers for horseshedding their witnesses, but conveniently not mentioned by Walter Olson in Reason Magazine. [FN118]

This second document was entitled Checklist for the Witness, and it appeared in a magazine published by The Defense Research Institute, Inc. [FN119] This document pounds into witnesses the message that they must tell the truth, and then defines "telling the truth" in thirty-four different ways, one of which is "[d]o not volunteer information not requested." [FN120] The same section then gives an example to demonstrate-as did the Baron & Budd document-the foolhardiness of anticipating a follow-up question that might never be asked. [FN121]

With respect to the claim that the Baron & Budd lawyers prompted distortion of the truth through exaggeration, training in assuming a "false" demeanor, and excessive rehearsal and coaching as to detail, the situation is more difficult to judge. First, the ground rules generally applicable to these forms of horseshedding are more contested, because the "truthfulness" of the resulting testimony is correspondingly more difficult for the lawyer and even the client to discern. Given the fragility of human perception, memory, and communication, a wide range of discrepant statements about the same event can all be true, or at least not false. [FN122] Thus, there may be considerable ethical *1363 leeway to coach witnesses to adopt one, rather than another, version of events. [FN123] Second, assessing the tenor of the Deposition Document in this regard is also more difficult because nuance is piled upon nuance, and the need to speculate on how the nuances played out only compounds the difficulty. [FN124]

The adversary system maintains somewhat of a schizophrenic position regarding discussions about proposed testimony that results in changes in the testimony that is actually given. Everyone agrees, for example, that an expert witness may be

taught to avoid the use of technical terms, or to avoid mannerisms that might displease a jury. [FN125] And a lay witness may be urged to use words that have accepted meanings in the context of a particular case, or not to use slang or derogatory terms. [FN126] On the other hand, most authorities hold that it is improper to "influence" the way in which a lay witness will testify, including influencing her choice of words. [FN127] But the distinction is vacuous, as well described by a student commentator:

It is unlikely that [the rule against improperly influencing a witness' testimony means] that any attempt to influence a witness' testimony is improper, since the entire process of witness preparation is directed to some degree at influencing a witness' testimony. Another possible interpretation is that only conduct that favorably influences a witness' testimony is proscribed. This interpretation is equally unsatisfactory for the same reason. Most legitimate pretrial preparation is directed at presenting the client's situation in a truthful, but favorable light. If a suggestion from counsel enhances the accuracy of the witness' communication, it would be ludicrous *1364 to determine the propriety of the conduct according to whether the client was affected favorably. [FN128]

In my view, it may be permissible to go even further, given the premise that the presentation of even factual testimony is a matter of advocacy, not reportage. [FN129] Suppose, then, that suggestions from counsel enhance the effectiveness of the witness's communication, without enhancing its accuracy. So long as the material eventually presented is still truthful, and at least not less accurate than the pre-horseshedding version, why should that be beyond the bounds of law? How does it differ from the effect of the advice that insurance company lawyers-not the Baron & Budd lawyers-routinely give to their witnesses: "Understand that the only thing I am telling you to say is to tell the truth. Everything else I am telling you is simply how to do that." [FN130]

The most severe critics of even standard horseshedding techniques object, of course, that instruction on "how to tell the truth" is already a long way down the slippery slope towards routine and "breezy" suborning of perjury. [FN131] In their simplistic view, one either tells the truth or one does not. [FN132] But the above discussion suggests that when other than categorical facts are at issue, one can tell the truth in many ways, some better-more effective-than others.

To test this proposition, and to focus attention back on the Baron & Budd Deposition Document, consider the admonition appearing in the general section on identification of asbestos products, after the specific listings on the work sheets: "Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another." [FN133] The same paragraph continued with the further advice to "Be CONFIDENT that you saw just as much of one brand as all the others." [FN134] The point of this advice was that "[a]ll the manufacturers sued in your case should share the blame equally." [FN135]

As in the advice about volunteering information discussed earlier, [FN136] the devil is not in the details, but in the surrounding circumstances. If Baron & Budd clients were led-even implicitly-to believe that they should express confidence even if they were not confident, that would obviously be improper. It would clearly violate the command of Model Rule of Professional Conduct *1365 1.2(d) and Texas Rule of Professional Conduct 1.02(c), which proscribe "counseling or assisting a client to commit crime or fraud." [FN137]

But suppose that a client was initially not sure about the mix of brands of a certain type of asbestos product used at one of his jobsites. It is unlikely, after all, that he would have thought about discrete brand names at all until his encounter with a lawyer. If, after horseshedding, after long discussion with family and co-workers, and after having looked at pictures of the various product labels, the witness was now able to make the more confident statement, under oath, that should be counted a success rather than a failure of the adversary system. Because of the intervention of the lawyer, the plaintiff will give interested, but truthful and effective, testimony that will help his case. [FN138]

To be sure, the now confident client may be mistaken. [FN139] But the defendant asbestos manufacturers and their insurance carriers are not helpless in the matter. Perhaps records are available showing which brands of which products were used at the jobsite in question during the time that the client worked there. If no such records exist, perhaps a purchasing agent or a jobsite foreman can testify from memory about what products were used, and the factfinder will then judge which confident memory is the more believable. Moreover, although the defendants cannot cross-examine the plaintiff about the

horseshedding session (because of the attorney-client privilege), they will have complete freedom to challenge the plaintiff's present memory and to confront the plaintiff with whatever contradictory information they have. [FN140]

Finally, there is the risk that abusive clients will take advantage of the situation. [FN141] Even if the Discovery Document and the lawyers using it do not imply that a witness should "remember" details about asbestos products that they do not in fact remember, and then feign confidence on top of that, some corrupt clients may do so on their own initiative. [FN142] But this is no more or less than the risk involved in all horseshedding, as Professor Freedman's example of the slipping and tripping workers with back injuries demonstrated. [FN143]

The only way to avoid that risk, however, is to prohibit horseshedding altogether, which-as Professor Freedman also demonstrated-is a cure worse *1366 than the disease. [FN144] In order to serve their clients with full vigor, lawyers must not be afraid to take ethical risks of their own.

IV. Professionalism Redefined: Courage, Competence, and Loyalty to Clients

At law school orientation one year, when I was visiting at Southern Illinois University School of Law, a retired judge told the entering students that legal ethics is easy. "You simply find the line between what is permitted and what is not," he said, "and stay far, far to the good side of that line." [FN145] I completely disagree, as I told my first year Professional Responsibility students in our first hour alone together.

Legal ethics is hard. You must try to find the line between what is permitted and what is not, and then get as close to that line as you can without crossing over to the bad side. Anything less is less than zealous representation-which already leaves you on the bad side of the line. Whatever distance is left to travel up to that illusive line is territory that belongs to the client and has been wrongfully ceded away.

Play that formula out in the context of horseshedding, and you have ethical lawyering in a nutshell. Arming the client with pertinent legal information and trusting the client to make good and legitimate use of it demonstrates loyalty and zeal-ousness. Recognizing that at some point a loyal servant can be manipulated into becoming an accomplice in crime is honoring the bounds of law. And knowing how to flirt with that boundary line but not cross over it is true professionalism.

True professionalism takes not only loyalty and the skill to find those boundary lines, but also courage. Professional lawyers must not only have the courage to make hard and close choices, but also the courage to stand up for the choices that they made. Lawyers have essentially only one job-to represent clients zealously, within the bounds of law. But not everyone-not even everyone within the legal profession- will praise lawyers for a job well done.

[FNa1]. Professor of Law, Indiana University School of Law-Indianapolis. B.A., 1966, Harvard College; J.D., 1969, Rutgers Law School (Newark). This essay is an extension of remarks I made at the Symposium on Witness Preparation, held at the Texas Tech University School of Law on March 10, 1999. I would like to thank the staff of the Texas Tech Law Review, especially Lead Articles Editor David Hartman, for assistance in preparing for the Symposium and in putting the finishing touches on this essay.

[FN1]. See Charles Silver, The Economics of Witness Preparation, 30 Tex. Tech L. Rev. 1383 (1999). Professor Silver delivered a shorter version of his paper at the Symposium in Lubbock. Professor Silver's list of scholarly writings is both long and impressive. Many of his published works deal with law of lawyering issues arising in connection with class actions, settlements, legal fees, and the so-called "eternal triangle" of liability insurance carrier, insured, and defense counsel engaged by the carrier.

[FN2]. Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, A Handbook on the Model Rules of Professional Responsibility § 101 (2d ed. 1990). Sixteen hours after I left Lubbock, I was in a hotel conference room in San Francisco, hard at work with colleagues from the National Conference of Bar Examiners, finalizing questions for the next two

sittings of the Multistate Professional Responsibility Examination (MPRE).

[FN3]. See McCraw v. Owens-Corning Fiberglass Corp., No 95-3109-A (28th Dist. Ct., Nueces County, Tex. June 2, 1995).

[FN4]. See id. As will be seen immediately below in the text, a controversy arose when a document used by plaintiffs' lawyers to prepare their clients to testify in asbestos injury cases was inadvertently turned over to defense counsel. See discussion infra Part I. The propriety of the document, and whether it retained its privileged character, reached the appellate courts in similar cases in two different counties. See In re Brown, No. 03-97-00609-CV (Tex. App.-Austin Apr. 30, 1998, orig. proceeding) (not designated for publication), 1998 WL 207793; In re Baron & Budd, P.C., No. 04-98-00010-CV (Tex. App.-San Antonio Apr. 22, 1998, orig. proceeding) (not designated for publication), 1998 WL 202329, opinion withdrawn, May 22, 1998.

[FN5]. See Accidental Exposure, Harper's Mag., Jan. 1, 1998, at 20, 23.

[FN6]. See Gary Wisby, Asbestos-Living with the Legacy, Chicago Sun-Times, Feb. 8, 1998, at 39.

[FN7]. See Dennis Cauchon, Town Choked by Asbestos Struggles to Overcome Homemade Disaster, USA Today, Feb. 9, 1999, at 8A.

[FN8]. See Asbestos: Hatch Introduces Measure to Reform Process for Compensating Claimants, Toxics L. Daily (BNA), Oct. 27, 1998, at D3.

[FN9]. See id.

[FN10]. See Tim Wyatt, Law Firm's Memo in Asbestos Lawsuit Sparks Ethics Debate, Dallas Morning News, Sept. 28, 1997, at 1A.

[FN11]. See, e.g., Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 446 (1997). This case involved railroad workers on Long Island, who were referred to as the "Snowmen of Grand Central." Id. The term refers to the fact that workers emerged from their work in the tunnels "covered from head to toe with white dust." Id.

[FN12]. See Joan C. Rogers, Special Report: Witness Preparation Memos Raise Questions About Ethical Limits, ABA/BNA Lawyer's Manual on Prof. Conduct, Feb. 18, 1998, at 48, 48.

[FN13]. See id.

[FN14]. See id.

[FN15]. See Bob Van Voris, A Cautionary Tale-Client Memo Embarrasses Dallas Firm- Baron & Budd Coaching of Witnesses Called Improper, Nat'l L.J., Oct. 13, 1997, at A1.

[FN16]. See id. Earlier, each client had filled out a pure work history, listing all employers, job locations, job assignments, duration of each job, and so on.

[FN17]. See id.

[FN18]. See Rogers, supra note 12, at 48.

[FN19]. See id.

[FN20]. See Preparing for Your Deposition (visited Apr. 20, 1999) http://www.dallasobserver.com/ archives/1998/081398/docs/terrell1.html> [hereinafter Preparing for Your Deposition]. This copy of the Preparing for Your Deposition document was prepared by client Willie Roy Reathy of Corpus Christi, Texas, one of the plaintiffs in the McCraw case. See McCraw v. Owens-Corning Fiberglass Corp., No. 95-3109-A (28th Dist. Ct., Nueces County, Tex. June 2, 1995). As described below, the existence of the document came to the attention of defense counsel during the deposition of Mr. Reathy, and copies were soon available throughout the country. See infra notes 21-30 and accompanying text.

[FN21]. See Rogers, supra note 12, at 49.

[FN22]. See Van Voris, supra note 15, at A1.

[FN23]. See id. The client was Willie Roy Reathy. See supra note 20.

[FN24]. See Wyatt, supra note 10, at 1A.

[FN25]. See id.

[FN26]. See Rogers, supra note 12, at 49.

[FN27]. See, e.g., John Council, Document Could Land Baron & Budd in Even Hotter Water, Tex. Law., Feb. 16, 1998, at 6; Van Voris, supra note 15, at A1; Wyatt, supra note 10, at 1A.

[FN28]. See, e.g., Michael Higgins, Fine Line, A.B.A. J., May 1998, at 52, 52-58; Rogers, supra note 12, at 48.

[FN29]. See, e.g., Walter Olson, Thanks for the Memories: How Lawyers Get the Testimony They Want, Reason, June 1998, at 59.

[FN30]. No indictments were returned by either of the grand juries. See id. at 61. The Texas State Bar's Office of the Chief Disciplinary Counsel dismissed the charges that had been filed. See Rogers, supra note 12, at 50.

[FN31]. I did testify, though not in person. At a hearing in the District Court in Corpus Christi, held on October 3, 1997, I was in the courtroom awaiting my turn, but court delays dictated that a brief affidavit be filed instead. Later, a much longer and more detailed affidavit was prepared, and one or the other of these affidavits was presented in litigation in other counties as well.

[FN32]. See Rogers, supra note 12, at 50.

[FN33]. Olson, supra note 29, at 59.

[FN34]. See id.

[FN35]. Id. (emphasis added).

[FN36]. A few phrases from the work history worksheets are included in the excerpt available from a loose-leaf service publisher. See Rogers, supra note 12, at 49. The format for each type of asbestos product, such as "rope packing," "pipe covering," or "block insulation," was essentially the same. Preparing for Your Deposition, supra note 20, at 5-6. The worksheets

described the product, its common uses and methods of use, its typical packaging format, and the kinds of workers likely to be exposed to it. See id. at 2-9. A fill-in-the-blank questionnaire then followed, allowing the worker to detail his own exposure, if any. See id. at 10.

Willie Reathy, the Corpus Christi worker whose worksheets were inadvertently turned over to defense counsel, left the form blank for "gun mix" and "pre-cut gaskets." Id. at 3-4. As to "sheet gaskets," however, he stated that he had "helped plumbers make gaskets in the Air Force," while working in the "boiler room at Orlando Air Force Base, 1954-1958." Id. at 4.

The forms gave hints about how easy it was to breathe in each kind of asbestos, and did not hide the fact that the more exposure to dust-type fibers, the easier the proof. See id. Thus "gun mix" was described as "a gray powder," and the worksheet stated that "it was dusty when the sacks were being dumped out and when it was mixed with liquid. . . . When Gun Mix was being sprayed, the air was usually filled with dust!" Id. at 3. "Pre-cut gaskets were not dusty," according to the worksheets, "but they gave off fibers when compressed as a pipe joint was tightened down." Id. at 3. No one has suggested that these descriptions were inaccurate, and at least in the case of Mr. Reathy, they did not seem to have influenced what he put on the worksheets.

Page 10 of the worksheets provided space for the client to write down the names, nicknames, and current addresses of every co-worker that he could remember working with, at the time of exposure to various asbestos products. See id. at 10. Concededly, this could be seen either as an aid to corroboration, or as an invitation to coordinate fabricated stories. Given the low level of sophistication of most of the workers involved, the former explanation is the more plausible.

[FN37]. See Preparing for Your Deposition, supra note 20, at 11-20.

[FN38]. See Rogers, supra note 12, at 50. Former Texas Supreme Court Justice Eugene Cook testified as an expert witness on behalf of one of the defendants. See id. Mr. Cook testified that:

Baron & Budd's witness-preparation document was "a cancer in the legal system" that violated Texas ethics rules and fell within the crime-fraud exception to any possible privilege.

Cook [further] testified that the document violated the rules that prohibit a lawyer from engaging in conduct involving dishonesty or fraud, that direct a lawyer not to assist a witness to testify falsely, and that command a lawyer not to assist the client in conduct the lawyer knows is fraudulent.

"This document tells the witness how to testify" without once instructing the witness to tell the truth, Cook stated. "I don't remember ever seeing a script like this in my lifetime that went so far in attempting to coach or script a witness." Id.Mr. Cook is correct that the Deposition Document does not in terms explicitly instruct the client-witness to testify truthfully, but he neglects to mention another document that was given to clients at the same time. See infra notes 118-21 and accompanying text.

[FN39]. See Preparing for Your Deposition, supra note 20.

[FN40]. See id. at 12.

[FN41]. Olson, supra note 29, at 59.

[FN42]. See Preparing for Your Deposition, supra note 20, at 12. The passage about young insurance company lawyers appears on page 12 of the Deposition Document, a page titled "Things to Watch Out For." Id. The first heading discussing such "things" is "Leading Questions;" the second is "Implications that You are Not Telling the Truth or Are Mistaken." Id. Questions about privileged material, general questions, and questions from the Baron & Budd lawyer on the scene follow on the next pages. See id. at 13-14.

With respect to defense attorney attempts to bully the witnesses and make them doubt their own recollections, the entire passage is as follows, with capitalization and bolding as in the original to give its flavor:

These questions are designed to make you believe they know something different from what you recall and what you are saying cannot be true. you you They may try to make you lose your temper or feel stupid because you have less education than they do. Keep in mind that these attorneys are very young and WERE NOT PRESENT at the jobsites you worked at. They have NO WERE NOT PRESENT NO RECORDS to tell them what products were used on a particular job, even if RECORDS they act like they do.

Your own recollection is your best asset. YOU know what YOU saw. YOU YOU If you begin to doubt your memory or change your answer to "Well, I think so," or "It could have been there," the attorneys will use your uncertainty against you and ask more and more questions about it. Never say "I guess so." The best way to respond to this kind of question is "Yes, I am SURE I SURE saw it there!" or "I KNOW it was that brand because I saw the name on the KNOW container."

Id. at 12.

[FN43]. Bryan A. Garner, A Dictionary of Modern Legal Usage 408 (2d ed. 1995). According to the dictionary entry, the term had a slightly different meaning in 1846, when James Fenimore Cooper wrote The Redskins. See id. The earlier usage applied to attempts to influence jurors (rather than witnesses), by dropping hints about the merits of pending cases. See id. Referring to today's practice of preparing witnesses, some lawyers use the term "woodshedding" instead, and the dictionary lists it as a synonym for horseshedding. Id.

[FN44]. See Monroe Freedman, Counseling the Client: Refreshing Recollection or Prompting Perjury?, in Lawyers' Ethics in an Adversary System 59-77 (1975) [[[[hereinafter Freedman, Adversary System]. As will be seen, I draw much of my argument in favor of most horseshedding from Professor Freedman. His argument has been reworked and refined in a chapter of another book of his, which carries the less provocative title "Counseling Clients and Preparing Witnesses." Monroe Freedman, Understanding Lawyers' Ethics (1990) [hereinafter Freedman, Understanding Lawyers' Ethics].

[FN45]. See Rogers, supra note 12, at 51.

[FN46]. See id.

[FN47]. See id. This analysis and advice turned out to be accurate. No sanctions of any kind were ultimately leveled against the Baron & Budd law firm or its individual lawyers, in large measure because there was insufficient evidence to proceed. See Olson, supra note 29, at 61. First, no criminal charges were filed, and the disciplinary charges that were filed were dismissed without opinion. See Rogers, supra note 12, at 50. Second, in the Corpus Christi litigation, the trial court took the matter under advisement, but the case was settled before a ruling was issued. See McCraw v. Owens-Corning Fiberglass Corp., No. 95-3109-A (28th Dist. Ct., Nueces County, Tex. June 2, 1995). Third, in the two cases to reach the appellate courts, both courts held, albeit in unpublished opinions, that the Deposition Document was privileged and thus was not required to be produced in response to further discovery.

In In re Brown, the Austin case, the defendants had successfully argued in the trial court that the privilege should not apply, because the client would testify about the same facts under oath in any event. No. 03-97-00609-CV (Tex. App.-Austin Apr. 30, 1998, orig. proceeding) (not designated for publication), 1998 WL 207793, at *1. The appellate court had no trouble rejecting this logic. While it is true that the privilege does not apply to the underlying facts, it quintessentially applies to communications between client and lawyer about those facts. See id. at *2. Thus, the defendants were perfectly free to ask the plaintiffs any question they wished about exposure to asbestos products; they were not, however, entitled to see how the clients had answered the same questions in the privacy of their lawyers' offices. See id. at *3.

As to the defendants' second argument, also initially accepted by the trial court-that the content of the document demonstrated that it was to be used to refresh the witness's recollections and also required invocation of the crime-fraud exception to the privilege-the appeals court responded: "Though the instructions are occasionally heavy-handed, they are not so overbearing as to justify destruction of the attorney-client privilege as to the entire document." Id. at *4. The court reached the same conclusion with respect to the crime-fraud exception in the San Antonio case. See id. at *3 (citing In re Baron & Budd, P.C., No. 04-98-00010-CV (Tex. App.-San Antonio Apr. 22, 1998, orig. proceeding) (not designated for publication), 1998 WL 202329, opinion withdrawn, May 22, 1998).

[FN48]. See Model Rules of Professional Conduct Rule 1.3 (1995).

[FN49]. See Model Rules of Professional Conduct Preface.

[FN50]. This title was derived, obviously, from the "axiomatic norm" of Canon 7 of the Model Code of Professional Respon-

sibility: A Lawyer Should Represent a Client Zealously Within the Bounds of the Law. Model Code of Professional Responsibility Canon 7 (1980). Although the Model Code did not contain an enforceable Disciplinary Rule explicitly incorporating the duty of zealousness, the concept stands as "the fundamental principle of the law of lawyering." Freedman, Understanding Lawyers' Ethics, supra note 44, at 65 (quoting Hazard & Hodes, supra note 2, § 1.3:101).

Agreeably to some and to the chagrin of others, when the American Bar Association promulgated the Model Rules of Professional Conduct in 1983, there was no longer any mandatory reference to zealousness at all. Instead, comment one to Model Rule 1.3 provides: "A lawyer . . . may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Model Rules of Professional Conduct Rule 1.3 cmt. 1. Without explanation and without apparent justification, the next sentence of the same comment continues as follows: "However, a lawyer is not bound to press for every advantage that might be realized for a client." Id.

With respect to the other half of the old formula, setting limits on partisanship, the Model Rules are sharper. Rule 1.2(d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. Id. at Rule 1.2(d).

[FN51]. When I became involved in the case, the copy of Preparing for Your Deposition that Mr. Reathy had filled out was already in the hands of defense counsel. See supra notes 22-26 and accompanying text. The defendants had filed a motion demanding a temporary restraining order and a temporary injunction staying all trials in which Baron & Budd was counsel of record, and staying all discovery except discovery with respect to questions raised by the document. In order to permit that discovery to go forward, the defendants also demanded a ruling that the Deposition Document fell within the crime-fraud exception to the attorney-client privilege. See John Henry Wigmore, 8 Evidence in Trials at Common Law § 2298 (1961). In response, the Baron & Budd law firm filed a motion demanding return of the document, and an order from the court prohibiting its use by the defendants in the litigation.

With respect to Mr. Reathy's own case, the defendants had a strong argument that the attorney-client privilege had been waived, even if the waiver was inadvertent. "The privilege is also lost if the client 'goes public' by inadvertence: inattention to confidentiality is generally treated as indifference, and therefore waiver." Hazard & Hodes, supra note 2, \\$1.6:103-1 (Supp. 1998) (citing, inter alia, Granada Corp. v. Honorable First Ct. of Appeals, 844 S.W.2d 223, 228 (Tex. 1992) (finding a waiver when a corporation inadvertently included four privileged documents among eighteen thousand documents produced in discovery)).

My testimony was largely limited to the question whether the privileged character of the document had been forfeited because of the crime-fraud exception. Because the burden is on the one invoking the exception, I would carry the day merely if I could persuade the court that the record was too thin. See Granada Corp., 844 S.W.2d at 227-28; Volcanic Gardens Management Co. v. Paxson, 847 S.W.2d 343, 347 (Tex. App.-El Paso 1993, no writ). The matter was briefed and submitted, but before the court could rule, the Reathy case itself was settled. By that time, of course, the Reathy document was in the public domain, and the question of whether it could be used and for what purpose-in other cases-was litigated in the context of those other cases. See supra notes 20-31 and accompanying text.

Central to my presentation in the Corpus Christi case was the point that the crime-fraud exception to the attorney-client privilege only applies when the client is seeking help in committing crime or fraud, regardless of whether the lawyer is a willing accomplice or an innocent dupe. See Paxson, 847 S.W.2d at 347. Texas uniformly adheres to that understanding of the exception. See id. As I testified, there was no evidence whatsoever that Mr. Reathy had approached the Baron & Budd law firm with a criminal plot to defraud the defendants in mind, or indeed that any of his actual testimony was untrue.

[FN52]. In remarks made at the live Symposium, but not included in his published article, Professor Charles Silver made what he called "a disclaimer about disclaimers." Professor Charles Silver, Speech at the Symposium on Witness Preparation at the Texas Tech University School of Law (Mar. 10, 1999). In his experience, issuing a disclaimer about paid testimony or sponsored research does not merely lead others to "take into account" possible bias. Id. Instead, people often claim an entitlement to dismiss entirely the substance of what is said, focusing solely on whatever money changed hands. See id. To force people actually to engage one's substantive argument or factual findings, he says, it is better not to disclose the underlying transaction at all. See id.

Although I sympathize with Professor Silver's frustration, and have experienced the same difficulty myself, I

believe he has proposed the wrong solution to the problem. In my view, the strongest response is to meet such critics on their own ground and point out the intellectual dishonesty of evading engagement though undue emphasis on unproved bias. Someone in Professor Silver's position ought to grant a critic a limited opportunity to probe for bias, but then insist that in addition the person respond on the merits. There is also a practical concern. If no disclosure is made and others later discover the fact of payment on their own, suspicion will only deepen, and there will be no hope of serious engagement on the merits.

[FN53]. After the existence of the Deposition Document had become known, several Texas and national newspapers conducted interviews with legal scholars specializing in legal ethics. See supra notes 27-29 and accompanying text. I was quoted as saying that some parts of the document were "quite troubling," but that "overall, I don't see much of a problem." Wyatt, supra note 10, at 1A. It is fair to say that this was the most favorable commentary quoted. See, e.g., id. (relating the opinion of Professor John Corkery of the John Marshall School of Law that the memorandum was "an unethical legal ploy called 'I'll tell you the law and you tell me the facts' ").

When I arrived in Corpus Christi for the court hearing, I was met at the airport by lawyers from Baron & Budd and the law firm defending it. Before the car started rolling out of the airport parking lot, the lawyers were already engaged in a mock cross-examination, to see just how "troubled" I was by which parts of the document, and how little of a "problem" I saw overall.

[FN54]. Given the multiple hats I wore during my discussions with Baron & Budd lawyers and their lawyers, our conversations are clearly protected by both the attorney-client privilege and the ethical rule of confidentiality. See Model Rules of Professional Conduct Rule 1.6 (1995). This means that I cannot disclose what was said during those discussions, although I can disclose the content of my eventual testimony, which is a matter of public record. See supra notes 31, 51. I can also write this essay about my own thinking on the issues raised in the litigation, so long as I do not thereby disclose what Model Rule 1.6(a) refers to as "information relating to [the] representation," which means information that I would not have had access to but for my involvement in the case. Model Rules of Professional Conduct Rule 1.6(a).

[FN55]. See Olson, supra note 29, at 61.

[FN56]. See id.

[FN57]. Id.

[FN58]. Id.

[FN59]. See id. at 59.

[FN60]. See Model Rules of Professional Conduct Rule 1.2(d) (1995); <u>Tex. Disciplinary R. Prof'l Conduct 1.02(c)</u>, reprinted in Tex. Gov't Code Ann., tit.2, subtit. G app. A (Vernon 1998) (Tex. State Bar R. art. X § 9); cf. supra note 38 (containing the remarks of Mr. Eugene Cook as an expert witness).

[FN61]. See supra notes 41-50 and accompanying text.

[FN62]. See Preparing for Your Deposition, supra note 20.

[FN63]. See supra note 54 and accompanying text.

[FN64]. See supra note 31.

[FN65]. See Wyatt, supra note 10, at 1A.

[FN78]. See id.

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[FN66]. See id.
[FN67]. See Freedman, Adversary System, supra note 44, at 74-76.
[FN68]. See id. at 74.
[FN69]. See id.
[FN70]. Id.
[FN71]. See id.
[FN72]. See id.
[FN73]. See id.
[FN74]. See Olson, supra note 29, at 59.
[FN75]. See Freedman, Adversary System, supra note 44, at 74.
[FN76]. See id.
[FN77]. See id.
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[FN79]. See W. William Hodes, Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind, 67 U. Colo. L. Rev. 1075, 1080-81 (1996) [[[[hereinafter Hodes, Lord Brougham].

[FN80]. See Model Rules of Professional Conduct Rule 1.2(d) (1995) (stating that a lawyer shall not aid a client in conduct that the lawyer "knows is criminal or fraudulent") (emphasis added); id. Rule 3.3(a)(2) (stating that a lawyer shall not knowingly "fail to disclose a material fact . . . when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client"); id. Rule 3.3(a)(4) (prohibiting the knowing presentation of evidence "that the lawyer knows to be false").

The question of what a lawyer "knows"-as opposed to suspects or believes-is the most difficult epistemological problem in all of legal ethics, followed closely by the problem of proving knowledge or its absence. Some lawyers purport to rely on the sophistic evasion that lawyers can never really "know" the truth, on the ground that in our system only the fact-finder is assigned the role of achieving actual knowledge. My defense of the lawyer's role in the adversary system does not depend on such a linguistic trick. See Hodes, Lord Brougham, supra note 79, at 1077-81 (stating that the defense lawyers in the O.J. Simpson case "knew" as a fact that the defendant had actually killed the two victims, but their use of aggressive trial tactics-not including knowing presentation of false evidence-was ethical and professional); see also Hazard & Hodes, supra note 2, § 403 ("Although his professional role may require a lawyer to take a detached attitude of unbelief, the law of lawyering does not permit a lawyer to escape all [moral and ethical] accountability by suspending as well his intelligence and common sense.").

[FN81]. See Hodes, Lord Brougham, supra note 79, at 1080-81; Franklin Strier, Making Jury Trials More Truthful, 30 U.C. Davis L. Rev. 95, 124-25 (1996).

[FN82]. See Strier, supra note 81, at 125.

[FN83]. See id. at 125-26.

[FN84]. See id. at 97. Professor Strier begins as follows: "In the American trial, there is illusion and there is reality. One pervasive illusion is that of an adversary system optimally suited to the discovery of truth. In reality, the adversariness of our trial proceeding is just as likely to hide or corrupt the truth." Id.

[FN85]. Naturally, the party with the weakest factual case will have the greatest interest in suppressing-through adversarial invocation of the rules of evidence and procedure-the truth. See Alan Dershowitz, Reasonable Doubts 166 (1996) ("[A] criminal trial is anything but a pure search for truth. When defense attorneys represent guilty clients-as most do, most of the time-their responsibility is to try, by all fair and ethical means, to prevent the truth about their client's guilt from emerging."). There is typically less opportunity in civil cases for this form of truth-suppression, but that is largely because the rules of evidence and procedure are markedly different. Some tactics to prevent the truth from emerging in a criminal case (such as relying on the Fifth Amendment and not having the defendant take the witness stand) are simply not available in a civil case. See U.S. Const. amend. V.

[FN86]. See Hodes, Lord Brougham, supra note 79, at 1082.

[FN87]. For analysis on the pros and cons of the adversary system, see generally Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (1975); Monroe H. Freedman, Judge Frankel's Search for Truth, 123 U. Pa. L. Rev. 1060 (1975); Hodes, Lord Brougham, supra note 79, at 1080-81; Strier, supra note 81, at 124-30.

[FN88]. See Olson, supra note 29, at 61.

[FN89]. As noted earlier, no one has ever suggested that the plaintiff whose actual Deposition Document became widely known, Willie Roy Reathy, either fabricated or even exaggerated any aspect of his deposition testimony. See supra notes 20, 36. He had no need to distort the truth, as far as anyone can tell, and thus horseshedding in his particular case seemed well-suited for its least controversial application-making basically truthful testimony more effective. In the various Texas asbestos cases, the defendants and opponents of aggressive horshedding techniques were more concerned with the potential for abuse as a general proposition. See supra note 4.

[FN90]. See Olson, supra note 29, at 61.

[FN91]. See, e.g., W. William Hodes, Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?, 87 Ky. L.J. (forthcoming 1999) (criticizing, among others, a federal judge for engaging in "equal opportunity lawyer-bashing" of lawyers who play by the current rules of the game, and legal academics who reject the adversary system without suggesting what might replace it); see also Teaching and Learning Professionalism, 1996 A.B.A. Sec. Legal Educ. and Admissions to the Bar, Rep. of Prof. Committee 4 n.16 (summarizing a letter I wrote to Dean Harry J. Haynsworth, a member of the Professionalism Committee, in which I complain that the Committee has conflated aspirational and legally enforceable conduct rules and unfairly sought to hold lawyers who have not violated the latter to the former).

[FN92]. See, e.g., Teaching and Learning Professionalism, supra note 91, at 5-10 (including the concession that no single definition holds and that professionalism can only be a set of aspirations, not an enforceable code); see also Eugene Cook, Professionalism and the Practice of Law, 23 Tex. Tech. L. Rev. 955, 956 (1992) (discussing the vagaries of the terminology); Nancy Moore, Professionalism Reconsidered, 1987 Am. Bar Found. Res. J. 773, 777-78 (discussing the variations in the definition of the term "professionalism").

[FN93]. Compare Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 453 S.E.2d 719, 722, 725 (Ga. 1995) (Benham, P.J., concurring) ("[I am fearful that] [e]thical rules which require lawyers to act as officers of the court may be subordinated to

rules requiring advocacy on behalf of clients Unbridled and blind advocacy could become the order of the day and the professionalism movement, for all practical purposes, would be dead in the water.") (emphasis added), with Monroe H. Freedman, The Ethical Danger of "Civility" and "Professionalism," N.Y. St. B. Ass'n Crim. Just. J., Spring 1998, at17, 18 ("[I]t follows, of course, that the success of the professionalism movement would leave zealous advocacy no less dead.").

[FN94]. Roscoe Pound, The Lawyer from Antiquity to Modern Times 5 (1953). This phrase is often incorporated into professionalism materials. See, e.g., ABA Commission on Professionalism, ". . . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243 (1987). This report is also known as the Stanley Commission Report and was first published in 1986. See ABA Commission on Professionalism, ". . . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism (1986).

[FN95]. For some of the better known critiques on the professionalism movement, see Rob Atkinson, A Dissenter's Commentary on the Professionalism Crusade, 74 Texas L. Rev. 259, 263 (1995) (challenging the professionalism "crusade's implicit assumption of one true professional faith and its tendency to condemn categorically certain modes of conduct as cardinal sins"); Amy R. Mashburn, Professionalism As Class Ideology: Civility Codes and Bar Hierarchy, 28 Val. U. L. Rev. 657, 672 (1994) (stating that elite elements of the organized bar use professionalism and civility to impose their values on lawyers generally); Jay Silver, Professionalism and the Hidden Assault on the Adversarial Process, 55 Ohio St. L.J. 855, 880-83 (1994) (stating that professionalism is an attack on criminal defense lawyers in particular).

[FN96]. See generally J. Thomas Greene, A Kinder, Gentler Justice System, 181 F.R.D. 559, 560 (1998) (discussing public opinion after the O.J. Simpson trial, and that the solution to this problem should come from lawyers, judges, and the media).

[FN97]. In this regard, the treatment afforded the lawyers involved in the inquiry into President Clinton's possible perjury and obstruction of justice during 1998 is instructive. See Michael Stokes Paulsen, Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and Its Limits, 61 Law & Contemp. Probs. 83, 103 (Winter 1998) [hereinafter Paulsen, Hell, Handbaskets]. Typically, Kenneth Starr and other lawyers from the Office of the Independent Counsel were either reviled or lionized, depending on the political proclivities of the observer. Compare Michael Harris, Going on the Offensive: The Outcome of Clinton's Impeachment Proceedings Is Already Known, Ottawa Sun, Jan. 19, 1999, at 6 (discussing prosecutorial abuse), with Stuart Taylor, Jr., Opening Argument, Nat'l J., Feb. 6, 1999, at 9 (discussing the unfair accusations against Ken Starr by the media). Only a few lawyer-commentators noted that all, or virtually all, of the hardball tactics employed by these prosecutors were within the bounds of law. See, e.g., Julian A. Cook, III, Mend It or End It? What to Do with the Independent Counsel Statute, 27 Harv. J.L. & Pub. Pol'y 279, 316 (1998) (approving of Ken Starr's methods while indicating that some areas of the independent counsel statute may need reform). Similarly, the President's personal lawyers were often taunted for the "nit-picking" and "technical" defense they mounted-as if it would have been permissible for them not to have done so. See David Goldstein, Plea to Senate: End Nightmare-Bumpers Closes Clinton Defense, Kan. City Star, Jan. 22, 1999, at A1.

The situation of the lawyers from the Office of White House Counsel is harder to judge. They may or may not have betrayed the interests of their client, in part because they may or may not have fully understood who their client was. Under standard principles of the law of lawyering, however, it should at least have been clear that William Jefferson Clinton, a citizen of the United States from Arkansas, was not their client. Whether there was a conflict of interest between this individual and their actual client, the Office of the President of the United States, is less clear. It is also not clear if they allowed Clinton the citizen to influence their representation of Clinton the incumbent President. See Michael Stokes Paulsen, Who "Owns" the Government's Attorney-Client Privilege?, 83 Minn. L. Rev. 473, 474 (1998) [hereinafter Paulsen, Attorney-Client Privilege]; Paulsen, Hell, Handbaskets, supra, at 84.

[FN98]. Naturally, I am not advocating blind endorsement of everything that every lawyer does. Lawyers may violate procedural and ethical rules and even commit crimes, for all of which they deserve censure and punishment. But when a lawyer represents a client zealously, within the bounds of law in a controversial case, it is incumbent upon other lawyers-at least while in the public square-to suppress their own personal feelings about the matter and to conduct themselves as professionals. See Model Rules of Professional Conduct Rule 1.2(b) (1995) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."). Whether a lawyer may justly be criticized for agreeing to represent a certain client or cause is a separate question; here

I am insisting only that when a lawyer has taken on a matter-especially a litigated matter-professionalism demands full bore client-centered representation. See id. Other lawyers, correspondingly, should recognize this point and protect their fellow professionals from unjust criticism based on inappropriate equation of the lawyer with the client. See id.

[FN99]. See Professor W. William Hodes, Speech at the Symposium on Witness Preparation at the Texas Tech University School of Law (Mar. 10, 1999).

[FN100]. See Accidental Exposure, supra note 5, at 20.

[FN101]. But see Wyatt, supra note 10, at 1A (suggesting that the memo was designed to create fraudulent evidence).

[FN102]. See Accidental Exposure, supra note 5, at 20.

[FN103]. See <u>Joseph Menn, Crossing the Line, J. Rec., Feb. 5, 1998, available at 1998 WL 1195747</u> (noting that the Baron & Budd memo instructed witnesses on what not to say).

[FN104]. See Wyatt, supra note 10, at 1A.

[FN105]. See generally <u>United States v. United Shoe Mach. Corp.</u>, 89 F. Supp. 357, 358-59 (D. Mass. 1950) (containing an often quoted definition of the attorney-client privilege); <u>Huie v. DeShazo</u>, 922 S.W.2d 920, 927 (Tex. 1996) (stating that attorney work product is documents prepared in anticipation of litigation, and that these documents are privileged).

[FN106]. For the leading academic treatment of the subject, see Richard C. Wydick, The Ethics of Witness Coaching, 17 Cardozo L. Rev. 1 (1995). For an excellent student note, see also Joseph D. Piorkowski, Jr., Note, Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching," 1 Geo. J. Legal Ethics 389 (1987). Both articles give many examples of what the authors judge to be proper and improper horseshedding, and both quote from many practice and trial manuals on the subject.

Professor Wydick distinguishes three "grades" of coaching. Wydick, supra, at 3. The first is overt instruction to testify in a way that the lawyer knows is false; the second involves covert instruction, but the lawyer still knows that the eventual testimony is false. See id. These two grades of witness coaching are obviously unethical and illegal, and Professor Wydick is chiefly concerned with the difficulty of detection and enforcement. See id. In "grade three" coaching, the lawyer effectively alters the testimony that the witness would have given but for the coaching, but does not know whether the eventual testimony is false. Id. at 4. This kind of coaching does not include the corrupt motive or result of the other two types, but Professor Wydick, while recognizing that it is very difficult to avoid, nonetheless frowns on it as interfering with the truthfinding function of the tribunal. See id. As will be seen below in the text, I am less troubled by this form of horseshedding.

[FN107]. See generally Higgins, supra note 28, at 56 (stating that few people believe that the attorney is the one actually responsible for a witness's lie).

[FN108]. See Dershowitz, supra note 85, at 166. Indeed, if the advocate represents the weaker side in the case, his or her obligation is to attempt to obscure the truth. See id.

[FN109]. See generally Harry I. Subin, The <u>Criminal Lawyer's "Different Mission:" Reflections on the "Right" to Present a False Case, 1 Geo. J. Legal Ethics 125, 139 (1987)</u> (discussing legal "truth" in terms of probabilities rather than certainties).

[FN110]. To avoid being misunderstood, I pause to state explicitly that there is a wide and legally significant difference between failing to present the whole truth and pettifogging on the one hand, and affirmatively telling lies on the other. Moreover, I insist that while the first two are legitimate weapons in the lawyer's arsenal, in or out of court, the third is illegitimate everywhere.

President Clinton, a lawyer, has been a master practitioner of the former two arts, and there is irony in the fact that he has been roundly criticized for it- quite inappropriately, in my view. Indeed, his exploits in this realm have only added to the lawyer-bashing fires. Yet, President Clinton has been treated more kindly-also inappropriately, in my view-by his countrymen for the actual lies he told in a courtroom setting. Although there were plausible arguments that the lies, when proved, ought not lead to impeachment or conviction upon impeachment, I am aware of no similarly plausible arguments against disbarment or other disciplinary sanction. See Jones v. Clinton, 36 F. Supp. 1118, 1131-32 (E.D. Ark. 1999) (holding President Clinton in contempt, imposing sanctions, and referring the matter to the Arkansas Supreme Court's Committee on Professional Conduct "for review and any disciplinary action it deems appropriate for the President's possible violation of the Model Rules of Professional Conduct").

[FN111]. See Preparing for Your Deposition, supra note 20, at 11.

[FN112]. Id.

[FN113]. Id.

[FN114]. See id. A similar example concerns use of respiratory equipment "to protect you from asbestos." Id. at 14 (emphasis added). As the Document correctly points out, if the facts are that the worker wore a mask for some other purpose, such as for welding, the correct answer to the pending question is no. See id.

[FN115]. See id. at 11.

[FN116]. Id. at 15.

[FN117]. See Model Rules of Professional Conduct Rule 3.4(b) (1995) (stating that an attorney "shall not . . . counsel or assist a witness to testify falsely").

[FN118]. See Olson, supra note 29, at 59-61. It appears that Mr. Olson, railing against partisan presentations that select only the most favorable evidence for inclusions, has engaged in a little selectivity of his own. See id.; see also Rogers, supra note 12, at 50 (stating that the Deposition Document was distributed with an article from the Defense Research Institute that stressed the duty to tell the truth).

[FN119]. W.B. Fitzgerald, Checklist for the Witness, For the Def., July 1992, at 18.

[FN120]. Id. at 20.

[FN121]. See id. The Checklist for the Witness document should also be a sufficient answer to those who complained that the Baron & Budd law firm did not, in the Deposition Document, explicitly instruct its clients to tell the truth. See Rogers, supra note 12, at 50.

In a letter to the editor of Reason Magazine, I pointed out the significance of the Checklist for the Witness document as a response to Walter Olson's earlier article in that same periodical. See W. William Hodes, Memory Gaps, Reason, Oct. 1998, at 10. Olson responded as follows, also in the October 1998 issue: "[this is] much as if a deranged mullah, after issuing his followers plans for blowing up the World Trade Center, had sought to dodge responsibility by pointing out that he had also given them copies of the Koran, a book that includes passages enjoining wanton violence." Walter Olson, Memory Gaps, Reason, Oct. 1998, at 11.

Passing the fact that this is more than a little over-the-top, Mr. Olson apparently missed my point. My point was not that the Baron & Budd lawyers were sugarcoating their own perjury manual with a goody-two-shoe exhortation that was intended to be winked away. It was rather that the insurance company lawyers horseshed their own witnesses in roughly the same ways, and that both are proper. Furthermore, the insurance company checklist did not merely include some isolated "passages" stressing the importance of telling the truth; it was so thoroughly dedicated to making that point that the Deposi-

tion Document could safely leave out such admonitions as superfluous. See Fitzgerald, supra note 119, at 18-23.

[FN122]. The reach of this proposition is not limitless. Many categorical statements that do not involve judgment or quantification are either true or false, and the person making them knows whether they are true are false. For example, the statement "that kind of asbestos product was used in my presence" is either true or not true. The same is so with respect to the statement "I do not remember if that kind of asbestos product was used in my presence." The witness is either telling the truth or lying about his own present state of mind.

When President Clinton made statements such as "I was never alone with Monica Lewinsky," we now know that he was lying, passing some illegitimate and undisclosed usage of the word "alone." But, given the short time span involved and the sensational nature of their lonesome encounters, the statement "I do not remember whether I was ever alone with Monica Lewinsky" must also have been a lie.

[FN123]. See Rogers, supra note 12, at 50. The first time I was engaged as an expert witness, in 1987, the lawyers horseshedding me stated their stance towards my testimony as follows: "We want you to testify as firmly as possible that such and such is so. And we will push you as hard as we can in that direction. But if we reach a point where you are no longer comfortable testifying as we would prefer, just say so and we will stop pushing." In my view, it is hard to improve on that statement of the proper relationship between lawyer and witness. The lawyers are advocates, seeking to maximize the chance that their client will prevail, but they recognize that the witness's perception that his testimony would not be truthful also serves as their boundary line.

[FN124]. See Rogers, supra note 12, at 51 (discussing the various potential issues implicated by the Deposition Document, such as the crime-fraud exception to attorney-client privilege).

[FN125]. See Piorkowski, supra note 106, at 400.

[FN126]. See id.

[FN127]. See, e.g., Geders v. United States, 425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it."). Unfortunately, as noted immediately below in the text, it is not obvious which influences are "improper" and which are not. See infra notes 128-42 and accompanying text.

[FN128]. Piorkowski, supra note 105, at 401.

[FN129]. See supra notes 107-10 and accompanying text.

[FN130]. In his Checklist for the Witness, Fitzgerald states, "The first and most fundamental rule is to TELL THE TRUTH. This sounds easy, but it is not. To tell the TELL THE TRUTH truth, you must follow many other rules." Fitzgerald, supra note 119, at 18.

[FN131]. Olson, supra note 29, at 59.

[FN132]. See id.

[FN133]. Preparing for Your Deposition, supra note 20, at 15.

[FN134]. Id.

[FN135]. Id.

[FN136]. See supra notes 112-15 and accompanying text.

[FN137]. Model Rules of Professional Conduct Rule 1.2(d) (1995); <u>Tex. Disciplinary R. Prof'l Conduct 1.02(c)</u>, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 1998) (Tex. State Bar R. art. X, § 9).

[FN138]. See Piorkowski, supra note 106, at 391.

[FN139]. See Wydick, supra note 106, at 11.

[FN140]. See Geders v. United States, 425 U.S. 80, 89-90 (1976).

[FN141]. See Freedman, Adversary System, supra note 44, at 74-76 (noting that clients in a state where an on-the-job injury must be accompanied by an "accident" may be unscrupulous and "remember" such an accident that did not really happen); see also supra notes 67-77 and accompanying text (discussing Professor Freedman's theory).

[FN142]. See Freedman, Adversary System, supra note 44, at 74-76.

[FN143]. See supra notes 67-77 and accompanying text.

[FN144]. See Freedman, Adversary System, supra note 44, at 74-76.

[FN145]. An excellent student note that uses the Baron & Budd Deposition Document as the centerpiece of its discussion of horseshedding expresses a similar thought in its title. See <u>Liisa Salmi, Note, Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial, 18 Rev. Litig. 135 (1999)</u>. The first sentence of this note quotes yet another aphorism: "If you have to ask whether you are crossing the line, then you probably are standing too close to it." <u>Id. at 136</u> (footnote omitted).

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