RUMINATIONS ON AN ETHICAL ISSUE WHEN EXAMINING THE CHILD WITNESS: ZEALOUS ADVOCACY OR DESTROYING EVIDENCE

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> Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.[1]

INTRODUCTION

The prosecution of Earl Bradley, based on a cache of videotape evidence confirming horrific abuse of children by their pediatrician, was resolved without testimony from a single child victim/witness.[2] Nonetheless, a "lesson" to be addressed from such a case is how the trial might have occurred without the videotape proof, a critical concern since significant questions arose regarding the constitutionality of the search of the pediatrician's office and the subsequent recovery of computer-stored images.[3]

Hence, at the *Lessons from Tragedy* symposium, the criminal law panel included an ethics component with hypothetical scenarios for audience discussion. The one that prompted the most debate, with no clear or satisfactory resolution arising out of the group discussion, involved whether defense counsel may "trigger" a child witness' fear, rendering her unavailable to testify. The precise hypothetical asked whether, when a client tells counsel "just mention the words 'Nightmare on Elm Street' and the child will freeze and not say a word," may counsel then use that phrase in a question at a pre-

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1. United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part).

2. *See* Jeff Mitchell, *Earl Bradley Trial Begins and Ends in One Day*, DOVER POST, June 9, 2011, http://www.doverpost.com/newsnow/x795265325/Earl-Bradley-trial-begins-and-ends-in-one-day.

3. State v. Bradley, No. 0912011155, 0912008771, 0912011621, 2011 Del. Super. LEXIS 168, at *50-51 (Del. Super. Ct. Apr. 13, 2011) (denying suppression of evidence but noting concerns about the warrant failing to properly identify the buildings to be searched, and concluding that there was at least some "prior illegality" before one of the warrants was obtained).

trial competence hearing or at trial (ensuring the child's inability to testify and thus potentially guaranteeing an acquittal)?

Audience responses ranged from the emotional "you are re-traumatizing the child" to the accusatory "you are obstructing justice" or "tampering with evidence." The cry was raised that posting this question would put counsel in conflict with the duty to seek truth, a point responded to with the argument that defense counsel has no duty to facilitate truth-seeking, but instead must seek an acquittal or other favorable outcome, albeit by lawful means.[4]

One attendee sought to establish relevance, averring that if the child is traumatized by a movie, but not by the alleged assault, then perhaps the latter never occurred, making this question arguably tied to an assessment of witness credibility. Some accepted asking the question under the general notion of zealous representation, the duty owed to a client (and made more substantial by the significant imprisonment[5] and attendant consequences[6] faced upon conviction). While it was acknowledged that a lawyer could not throw a physical item at the child to frighten her, an act both contumacious and criminal, it remained unresolved whether a question, albeit one that would have the same concussive effect, was impermissible.

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4. As one Judge described, "[t]he cross-examiner does not want to discover the truth: what he wants to do is get the accused off; and in order to do that he has to raise a reasonable doubt as to whether the prosecution have proved their case." Fiona E. Raitt, *Judging Children's Credibility – Cracks in the Culture of Disbelief, or Business as Usual?*, 13 NEW CRIM. L. REV. 735, 743 (2010) (quoting Iain Macphail QC, *Child Witnesses in Scotland Today*, REPORT OF CONFERENCE PROCEEDINGS, Justice for Children Reform Group (2004)).

5. Here, indeed, Bradley received a total of fourteen life sentences. *Dr. Earl Bradley Sentenced To 14 Life Sentences*, WMDT.COM (Aug. 30, 2011), http://www.wmdt.com/story/15335753/dr-earl-bradley-sentenced-to. While sentencing practices may vary from state to state, there is no question that harsh punishment may follow a conviction for a sexual assault. Data from Washington State show that, "[i]n fiscal year 2003, the average sentence length for all felonies was 37.3 months, compared to 90.8 months for sex offenses." WASH. SENTENCING GUIDELINES COMM'N, SEX OFFENDER SENTENCING 1 (2004), *available at* www.hawaii.edu/hivandaids/Washington_Sex_Offender_Sentencing_Guidelines_Commission,_2004.pdf. Using 1992 data, the Bureau of Justice Statistics determined that in 1992, nationally, "[o]ver two-thirds of convicted rape defendants received a prison sentence [and] . . . the average term imposed was just under 14 years. About 2% of convicted rapists received life sentences." LAWRENCE A. GREENFELD, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT: SEX OFFENSES AND OFFENDERS, at v (1997), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF.

6. *See, e.g.*, 42 U.S.C. §§ 16911, 16915 (2006) (requiring sex offender registration and community notification, with lifetime registration for those convicted of sexual acts with a child under the age of thirteen). Additionally, under state "sexually violent predator" laws there is a substantial risk of a lifetime commitment following incarceration. Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungverwahrung*, 30 FORDHAM URB. L.J. 1621, 1640 (2003) ("[F]or most it seems that civil commitment as a sex offender has turned into lifetime confinement."). Currently, roughly twenty states have such provisions. Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 975-76 (2011).

Having written the question presented at the symposium, this author came away discomfited by the lack of a clear answer, an indeterminacy that now appears the result of using the Model Rules of Professional Conduct[7] as the primary determinant, without regard to evidentiary and criminal law. This "rumination" on the hypothetical is what follows; it begins with the Model Rules, and then informs the analysis with an assessment of evidentiary relevance and a review of the criminal law governing witness tampering.

A. The Pertinent Rules

The oft-quoted duty of the attorney to provide "zealous" representation[8] offers no guidance whatsoever. The command to be "zealous" is limited to the preamble and is not thereafter a component of any rule; and when referenced in the Comment to Rule 1.3, the advice is seemingly in conflict:

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . .The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.[9]

This language is decidedly permissive. That a lawyer "is not bound" to press for advantage is remarkably elastic, allowing discretion; and that the rule does not "require" offensive tactics certainly does not proscribe the same. One further observation deserves note here. While counsel's obligation may increase when her client is of minor age, vulnerable, or operating with "diminished capacity,"[10] there is no corresponding duty to a witness or opposing party with those attributes. Intriguingly, the Model Rules have no provision governing cross-examination or the treatment of witnesses.[11]

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7. MODEL RULES OF PROF'L CONDUCT (2006).

8. *Id.* at PREAMBLE. ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.") Similarly, Rule 6 of the International Code of Ethics published by the International Bar Association simply states: "Lawyers shall without fear defend the interests of their clients and without regard to any unpleasant consequences to themselves or to any other person." Int'l Bar Ass'n, *International Code of Ethics*, at Rule 6 (1988), *available at* http://www.int-bar.org/images/downloads/international_ethics.pdf. *See also* Raitt, *supra* note 4 (emphasizing the lack of ethical regulation for lawyers who cross-examine child witnesses).

9. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2006).

10. *Id.* at R. 1.14. The concern of the child *client* is reiterated in Comments 1-4 to MODEL RULE 1.14, which address the dilemma of explaining the issues involved in representation to a child or person of diminished capacity. *Id.* at cmt. 1-4; MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 6.

11. *See* MODEL RULES OF PROF'L CONDUCT (2006) Appendix A: Subject Guide. (The Subject Guide to the Model Rules has no reference to cross-examination, and limits the topics under the term "witness" to "bribing," expenses, the lawyer as witness, and the right of the client to elect whether to testify.)

Rule 3.1 offers the potential for guidance, but again falls short. It prohibits "assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . ." but then apparently authorizes a more aggressive approach in criminal cases, where counsel "may nevertheless so defend the proceeding as to require that every element of the case be established."[12] Again, the comments are less than elucidating, emphasizing the "duty not to abuse legal procedure[,]"[13] a concern seemingly addressing unsustainable factual averments or legal arguments, stating that "[t]he action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."[14] Yet even if the term "action taken" includes the proposing of a question, the next portion of the Comment again weakens the proscription, emphasizing that this Rule is "subordinate" to the right to effective counsel in criminal cases.[15] Nor is this duty limited by the obligation of "candor toward the tribunal," which prohibits "offer[ing] evidence that the lawyer knows to be false."[16]

If there is a Model Rule addressing this hypothetical, it is Rule 3.4, which guides the advocate in "Fairness to Opposing Party and Counsel."[17] The Rule's first command, that a lawyer not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value[,]"[18] is delimited by the adverb "unlawfully," and thus is applicable only if a specific law is breached, a point discussed below.[19] The Rule's second command, prohibiting a lawyer from "falsify[ing] evidence," is clearly inapposite.[20] The Comment section to this Rule is of dubious help, speaking only in generalities, in that "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."[21]

The conflation of the Rule's term "unlawfully" with the Comment's "improperly" leaves one without guidance—is the latter a synonym or a replacement of the former? Unless the "freezing" of the child equates with "destruction . . . of evidence," the prohibition is inapt.

But the Rule goes on, prohibiting counsel at trial from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not

12. MODEL RULES OF PROF'L CONDUCT R. 3.1.
13. *Id.* at R. 3.1 cmt. 1.
14. *Id.* at R. 3.1 cmt. 2.
15. *Id.* at R. 3.1 cmt. 3.
16. *Id.* at R. 3.3.
17. *Id.* at R. 3.4.
18. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2006).
19. *See infra* Part D.
20. MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2006); *See infra* Part D.
21. MODEL RULES OF PROF'L CONDUCT R. 3.4(b) cmt. 1 (2006).

be supported by admissible evidence . . . ."[22] Yet here, the Comment offers no elaboration or guidance whatsoever. Clarification is also not available through the collection of the ABA's Formal Ethics Opinions Archive by Subjects,[23] which has no document remotely related to the examination of a witness.[24] Only if the "freezing" of the child is truly irrelevant *and* it could not be reasonably believed to be otherwise will this Rule be violated.[25]

Scholarly and judicial reference to Model Rule 3.4 or its State Bar counterparts is similarly not on point, addressing the Rule as it applies to improper closing argument[26] or to referencing "unprovable facts" in an effort to sway factfinders by insinuation.[27]

The final Model Rule of potential application is 8.4, part of the *Maintaining the Integrity of the Profession* subsection, which deems misconduct "(c) engag[ing]

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22. *Id.* at R. 3.4(e).

23. *Formal Ethics Opinions Archive by Subject*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/index_by_subject.html.

24. This vacuum may not be surprising. There is little guidance for, and little regulation regarding, the cross-examination of children or other vulnerable witnesses. *See* LOUISE ELLISON, THE ADVERSARIAL PROCESS AND THE VULNERABLE WITNESS 87-88, 104-109 (2001). However, some change has been implemented internationally. The United Kingdom offers a variety of protections to "vulnerable and intimidated witnesses" in its Youth Justice and Criminal Evidence Act 1999. Youth Justice and Criminal Evidence Act, 1999, c. 23 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1999/23/contents. Similar protections exist in Scotland. *See* Vulnerable Witnesses (Scotland) Act, 2004, (A.S.P. 3), § 6, *available at* http://www.legislation.gov.uk/asp/2004/3/section/6. In the United States, accommodation comes in use of CCTV testimony and special accommodations for the child witness, but generally without a restriction on cross-examination. *See* SUSAN R. HALL & BRUCE D. SALES, AM. PSYCHOLOGICAL ASS'N, COURTROOM MODIFICATIONS FOR CHILD WITNESSES 65-99 (2008). Indeed, it is emphasized that "[w]ithin broad parameters, attorneys have the right to question witnesses as they see fit. Judges are particularly deferential to defense counsel's right to cross-examine prosecution witnesses, including children." TASK FORCE ON CHILD WITNESSES, AM. BAR ASS'N, THE CHILD WITNESS IN CRIMINAL CASES 26 (2002).

25. An evidentiary analysis of the purported relevance of the child "freezing" is discussed *infra* Part C(3).

26. *See, e.g.*, Anthony Flores, *You Can't Say That, or Maybe You Can: An Analysis of Michigan Prosecutor Closing Argument Law*, 88 U. DET. MERCY L. REV. 273, 277-78 (2010).

27. *See, e.g.*, J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 769 (1988). Such use of inadmissible and inflammatory information in a question was condemned as early as 1893:

> Its only purpose, therefore, was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider.

People v. Wells, 34 P.2d 1078, 1079 (Cal. 1893).

in conduct involving dishonesty, fraud, deceit or misrepresentation; [and] (d) engag[ing] in conduct that is prejudicial to the administration of justice[.]"[28]

Again, commentary is less than specific and provides little guidance for the issue addressed in this Article. The prohibition on conduct involving "dishonesty" or "deceit" has no specific accompanying commentary,[29] and much of the Rule's Comment is focused on which crimes committed *extrinsic* to representation are appropriately treated as misconduct.[30] Paragraph (d) is explained in the Comment as addressing instances when the attorney "knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status," with the additional and necessary condition that "such actions are prejudicial to the administration of justice."[31] Given the exclusion that "[l]egitimate advocacy respecting the foregoing factors does not violate paragraph (d)[,]"[32] and the lack of a "bias or prejudice" in the hypothetical, Rule 8.4 has no application here unless this conduct, intrinsic to representation, is criminal. That question is pursued below.[33]

B. Scholarship and Examining the "Truthful Witness"

A quest for an answer to the permissibility of the tactic deployed in the hypothetical may also turn to the more general commentary, that addressing the limits of cross-examination of a witness known to counsel to be telling the truth.[34] Again, the guidance is limited, as the typical concern is whether ethical precepts prevent a credibility attack upon a witness known to be truthful. The tension is between those who advocate permission so that when "there is any . . . legitimate purpose, the lawyer may cross-examine on a personal trait of the witness, regardless of the effect on the witness,"[35] and the view that:

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28. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2006).

29. *See Id.* at R. 8.4 cmt.

30. *Id.* at R. 8.4 cmt. 2.

31. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3.

32. *Id.*

33. *See infra* Part D.

34. A cornucopia of writings addresses this issue. *See, e.g.*, Philip H. Corboy, *Cross-Examination: Walking the Line Between Proper Prejudice and Unethical Conduct*, 10 AM. J. TRIAL ADVOC. 1 (1986); Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563 (1996); David Layton, *The Criminal Defence Lawyer's Role*, 27 DALHOUSIE L.J. 379 (2004); Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055 (2000-2001); John W. Stanford, *The Christian Lawyer: Defending Apparently Guilty Defendants and Using Deceptive Courtroom Strategies and Tactics*, 16 REGENT U. L. REV. 275 (2003-2004); R. George Wright, *Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character*, 83 KY. L.J. 801 (1994-1995).

35. Stanford, *supra* note 34, at 295.

> [u]nless we abandon completely the notion that verdicts should be based upon the truth, we must accept the fact that there may simply be no version of the facts favorable to the defense worthy of assertion in a court. In such cases, the role of the defense attorney should be limited to assuring that the state adduces sufficient legally competent evidence to sustain its burden of proof.[36]

Generally, the former position prevails. As Professors Freedman and Smith note in discussing the appropriateness of cross-examining the truthful witness "to make the witness appear to be mistaken or lying," the authors' answer of "yes" is "the same answer . . . given by almost every other commentator on lawyers' ethics."[37] And that this applies even when the witness is a child is not left in doubt—what may change is the tactic, using kindness rather than acerbity to achieve the goal of totally discrediting the witness.[38]

Yet the hypothetical that this Article focuses on does not involve whether one may cross-examine, or even the propriety of a cross-examination intended to discredit to the point of utter disbelief by the trier of fact. Rather, it is whether a type of question that will not make a point but instead deter testimony is allowable. Reference therefore must be made to the separate commentary urging that counsel never perpetrate a "fraud" upon the courts. This position was emphatically presented by then-Judge Warren Burger, who maintained that "a lawyer may never, under any circumstances, knowingly present false testimony, or false documents, *or otherwise participate in a fraud on the court.*"[39]

Yet, what is the "fraud" in this hypothetical? There is no presentation of anything false in nature, and that is the essence of this prohibition, now embodied in Model Rule 3.3(a)(1).[40] What may possibly be fraudulent is the proffered justification for the question, an issue addressed below.[41] Otherwise, the various commentaries and text offer little concrete guidance.

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36. Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 146 (1987-1988) (footnote omitted).

37. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 206 (4th ed. 2010).

38. *See, e.g.*, Major Peter N. Carey, *Cross-Examination of the Child or Sex Victim*, 27 A.F. L. REV. 125, 125-26 (1987).

39. Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 12 (1966) (emphasis added).

40. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2006) (prohibiting a lawyer from knowingly "mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer"). Where the issue of deceitful behavior is now attracting discussion is when lawyers or their agents seek access to a witness' or party's social networking without disclosing the reason for gaining admission. Jaclyn S. Millner & Gregory M. Duhl, *Social Networking and Workers' Compensation Law at the Crossroads*, 31 PACE L. REV. 1, 30-39 (2011). Again, however, there is a misrepresentation aspect to the social networking issue that is absent from the hypothetical at hand.

41. *See infra* Part D.

C. Answering the Audience Comments

Before identifying the one approach that comes closest to resolving the hypothetical, the application of the statutory prohibition on witness tampering, it is necessary to make clear what rationales have no place in the analysis.

1. Re-traumatizing

There can be no ethical limit on an attorney's conduct arising solely from the risk that the child witness will be re-traumatized. To accept this as a governing principle in a criminal trial offers no guidance and, instead, leads ineluctably to an abandonment of the adversarial role; for the entirety of the process may re-traumatize a child witness[42] and thus requires counsel, under this rubric, to refrain from cross-examination of the child, or from having her appear in court at all (in violation of a defendant's right to be confronted by the witnesses against him or her). That "re-traumatizing" a child cannot be the measure is confirmed by the law governing courtroom accommodations for children—there is a presumption that some children will be distressed by courtroom testimony, but the remedy (available only when the child will be traumatized not by the courtroom in general, but by having to face the specific accused) is not a ban on questioning,[43] but the option of a change in location, with testimony via closed-circuit television.[44] As the United States Supreme Court has explained, trauma is inherent in the courtroom process; "face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult."[45]

2. The Motive of Preventing a Child's Testimony

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42. *See, e.g.*, L. Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. the Accused's Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439, 439-40 (1994) (citing studies regarding the traumatic impact of testifying in court, especially where the abuser is a family member); Rebecca Nathanson & Karen J. Saywitz, *The Effects of the Courtroom Context on Children's Memory and Anxiety*, 31 J. PSYCHIATRY & L. 67 (2003).

43. Some courts have approved reducing trauma by denying a self-representing defendant the right to cross-examine the child complainant. *See, e.g.*, Fields v. Murray, 49 F.3d 1024, 1036 (4th Cir. 1995) (en banc) ("It is far less difficult to conclude that a child sexual abuse victim will be emotionally harmed by being personally cross-examined by her alleged abuser than by being required merely to testify in his presence."); Smith v. Smith, No. 05-CV-74045-DT, 2007 U.S. Dist. LEXIS 39902, at *20-22 (E.D. Mich. May 31, 2007) (following *Fields*); Partin v. Commonwealth, 168 S.W.3d 23, 27-29 (Ky. 2005) (following *Fields*).

44. Maryland v. Craig, 497 U.S. 836, 852 (1990). "The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id.* at 856.

45. *Id.* at 846-47 (quoting Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988)).

Again, the subjective rationale of desiring to prevent a child (or any witness) from testifying does not, without more, make conduct unethical. To the contrary, the law recognizes grounds for barring the child witness from being heard at all, in particular challenges to witness competence[46] and the related but independent ground of taint, the pre-trial determination of whether a child's in-court testimony was demonstrably unreliable because it had been created by suggestive interviewing techniques.[47] Although the competence bar has been reduced significantly by statute[48] and decisional law,[49] and in some circumstances eliminated entirely,[50] its persistence confirms that in a proper case, counsel for an accused has a legal (and therefore ethical) basis for seeking to bar a child witness from testifying. Hence, this motive will have no impact absent an unlawful means of implementation.

3. Relevance

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46. Decisional law on whether a child is competent to testify dates back to at least 1895 and the seminal holding in *Wheeler v. United States*, which conditioned competence on "the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former." 159 U.S. 523, 524 (1895). Today, this general standard is applied in many but not all jurisdictions, with some eliminating the competence bar entirely. Michelle L. Morris, Comment, *Li'l People, Little Justice: The Effect of the Witness Competency Standard in California on Children in Sexual Abuse Cases*, 22 J. JUV. L. 113, 116 (2001-2002).

47. *See* State v. Michaels, 642 A.2d 1372, 1382 (N.J. 1994) (holding that "to ensure defendant's right to a fair trial a pretrial taint hearing is essential" due to the improper and suggestive investigatory interviews of children). Not all states allow an inquiry into "taint," with some including the concern in the competence determination; *see, e.g.*, Morganflash v. State, 76 P.3d 830, 835 (Wyo. 2003), and others limiting such an inquiry to cross-examination at trial; United States v. Cabral, 43 M.J. 808, 811-12 (A.F. Ct. Crim. App. 1996); State v. Michael H., 970 A.2d 113, 121 (Conn. 2009).

48. *E.g.*, 18 U.S.C. § 3509(c)(4) (2006) ("A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.").

49. Numerous holdings permit testimony by extremely young children. *See* People v. Daniel, No. C050613, 2006 WL 3617020, at *7 (Cal. Ct. App. Dec. 13, 2006) (upholding trial court determination that three-and-one-half-year-old was competent); Kelluem v. State, 396 A.2d 166, 167 (Del. 1978) (holding child age four years, five months at time of trial competent to testify); B.E. v. State, 564 So. 2d 566, 567-68 (Fla. Dist. Ct. App. 1990) (collecting cases upholding competency determinations for three and four-year-old witnesses); Dunham v. State, 762 P.2d 969, 971-72 (Okla. Crim. App. 1988) (affirming finding of competency of four-year-old child). This is the case even where the child evinces fantastic thinking. *See, e.g.*, United States v. LeMere, 22 M.J. 61, 64, 66 (C.M.A. 1986) (holding competent a child close to four years of age who testified, *inter alia*, that "she lived in a store and had seen trial counsel 'go potty' at her home").

50. *See, e.g.*, ALA. CODE § 15-25-3(e) (2011) ("Notwithstanding any other provision of law or rule of evidence, a child victim of a physical offense, sexual offense, or sexual exploitation, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding."). Similar statutes are found in Connecticut, Georgia, Utah and West Virginia. Morris, *supra* note 46, at 123.

As noted above, one member of the audience posited an evidentiary relevance claim for the child "freezing" when questioned about a movie. Yet notwithstanding the exceptionally low threshold for relevance,[51] the suggestion is wrong, as there is no basis for treating the trauma of a frightening movie as equivalent to that of a sexual assault. Because so much of child sexual abuse is intra-familial, or committed by familiars,[52] the act may have significant emotional sequelae[53] but not of the immediate terror-inducing nature generated by a "scary" movie. This may be particularly so where the act of abuse has been preceded by a process of "grooming," a seductive modality that entices a child into accepting what is actually coerced, non-consensual behavior.[54] If grooming has occurred, trauma resulting from a film may not correlate with a child being subjected to an abhorrent act disguised as a game or a putative form of love.

It may be only where the charged criminal act has the "scary" nature of the film that relevance lies. Even in that potentially narrow subset of cases, what is relevant is not the act of causing the child to illustrate the fear (juxtaposed to the absence of trauma/"freezing" when the assault allegedly occurred), but the historic fact that the child has 'frozen' in the past. It is the behavior that the child *has* evinced, and not the demonstration of the behavior, that has probative value.

One could fathom a situation where the traumas were equivalent and there was no witness available to prove the historic act of "freezing" in response to exposure to the terrifying event. That absence of proof arises when the sole source of information is the accused, the party least likely to testify.[55] Yet with

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51. *See, e.g.*, Multimatic, Inc. v. Faurecia Interior Sys. USA, Inc., 358 F. App'x 643, 652 (6th Cir. 2009) ("Rule 401 sets a low threshold for relevance, however, which is to say, evidence having any tendency to make the existence of any relevant fact more [or less] probable."(internal quotations omitted)).

52. Nat'l Child Traumatic Stress Network, *Child Sexual Abuse Fact Sheet*, NCTSN.ORG, 3 (Apr. 2009), http://www.nctsnet.org/sites/default/files/assets/pdfs/ChildSexualAbuseFactSheetFINAL_10_2_07.pdf.

53. *See, e.g.*, Kimberly A. Tyler, *Social and Emotional Outcomes of Childhood Sexual Abuse: A Review of Recent Research*, UNIV. OF NEB.-LINCOLN, SOCIOLOGY DEP'T (Dec. 1, 2002), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1053&context=sociologyfacpub (detailing various emotional harms including drug use, suicidal ideation, and other problems).

54. *See, e.g.*, Pennsylvania Coalition Against Rape, *Grooming Behaviors*, HERO PROJECT (last visited Mar. 20, 2012), http://www.heroproject.org/en/grooming-behaviors.

55. *See, e.g.*, Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 852 (2008) (emphasizing studies showing "that up to half of all criminal defendants who proceed to trial elect not to testify on their own behalf"). A compounding problem arises when the accused has a criminal record, because "60% of defendants without criminal records testified, compared to 45% with criminal records." Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and On Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357 (2009).

that relevance comes application of the Rule 403[56] balancing, and it is hard to conceive of a more unfair prejudice than the forced creation of testimonial unavailability, coupled with the trauma imposed on the child who is being made to "freeze." Notwithstanding a defendant's Due Process right to present core evidence of innocence,[57] it is unimaginable that this may come at the dual costs of witness exclusion and concomitant imposition of pain and suffering. Hence, the claim of relevance is either factually incorrect or inadequate to overcome the resulting prejudice.

D. An Attempted Resolution of the Debated Propriety

What the above discussion should make clear is that absent a determination that the attorney's conduct is criminal, the Model Rules offer no clear governance. Accordingly, the hypothetical question at hand must be assessed in terms of the most pertinent criminal offense, witness tampering.[58]

The prohibition against witness tampering is defined as "knowingly . . . us[ing] intimidation . . . with intent to influence testimony . . . in an official proceeding."[59] Here, there are two operative concerns— what conduct constitutes "intimidation," and what the actor's intent was.

The former is resolved, in part, by the language in standard jury instructions and decisional law. Juries are told that "[i]ntimidation includes frightening a person, inspiring or affecting him by fear or deterring him by threats."[60] This is reflective of long-standing decisional law applying the statute to acts designed to "make someone fearful."[61] Each standard follows that of

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56. Federal Rule of Evidence 403 provides that relevant evidence may be excluded if "its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . ." FED. R. EVID. 403.

57. Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (affirming that an accused is guaranteed "a meaningful opportunity to present a complete defense" (quoting California v. Trombetta, 467 U.S. 479, 485 (1984))).

58. This Article uses the federal witness tampering statute, 18 U.S.C. § 1512 (2006), as the template for the following discussion. State statutes prohibiting such conduct in non-federal prosecutions also abound. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 4952 (1983) (prohibiting acts of intimidation that would cause a person to "withhold . . . testimony"). Delaware requires a finding of malice, in particular "an intent to vex, annoy, harm or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice." DEL. CODE ANN. tit. 11, § 3531(1) (2010).

59. United States v. Cruzado-Laureano, 404 F.3d 470, 487 (1st Cir. 2005) (summarizing the elements of 18 U.S.C. § 1512(b)(1), and noting that the defendant can assert as an affirmative defense that "the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully").

60. JOHN S. SIFFERT, MODERN FED. JURY INSTRUCTIONS-CRIMINAL vol. II, ch. 46, P 46.05, Instruction 46-31 (2011).

61. *See* United States v. Johnson, 968 F.2d 208, 211 (2d Cir. 1992) ("To intimidate means to discourage someone by threats or by a threatening manner or to make someone fearful.").

common usage; the dictionary definition of "intimidation" is "to force into or deter from some action by inducing fear . . . ."[62]

The tampering statute excludes lawful conduct from its reach, but it does so with an express limitation—a lawful act may be used only where "the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully."[63] Because the intent in this hypothetical is to cause the child to freeze, i.e., to desist from testifying, rather than to testify truthfully, the act is apparently criminal, albeit one occurring within the normal trial process.

Yet even this conclusion cannot be made unequivocally. The tampering provision of the federal criminal code is part of a broader chapter, one that offers an affirmative defense to counsel, stating, "[t]his chapter [18 U.S.C. §§ 1501 et seq.] does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding."[64]

With this limiting condition, particularly as decisional law permits the attorney/defendant to raise his/her "ethical obligations" as relevant to whether the statute's mens rea was established,[65] the inquiry circles back to the question of relevance. Only if this article's determination of an absolute lack of relevance is correct does the criminal prohibition apply, as such questioning is thus incompatible with "ethical obligations."

Albeit rare, and without a record of a criminal prosecution of an attorney for conduct close to that in the hypothetical, it is not unheard of for an attorney's questioning of a witness to be deemed a form of intimidation. This has occurred in the disciplinary context. As one court described, "[r]espondent, we conclude, engaged in calculated trial tactics to provoke and bait opposing counsel, intimidate and demean witnesses, and obfuscate the record. To corrupt the trial process in this manner is prejudicial to the administration of justice and is unprofessional conduct."[66]

In sum, a trial "tactic" may reach the level of witness intimidation, at least for disciplinary code purposes. While the enactors of witness tampering statutes may not have envisioned their application in the courtroom, the broad language and limited defense must inform a lawyer's professional conduct. What can be drawn from this is that, in light of the intent of the tampering

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62. *Intimidate*, DICTIONARY.COM (2012), http://dictionary.reference.com/browse/intimidate.

63. 18 U.S.C. § 1512(e) (2006).

64. 18 U.S.C. § 1515(c) (2006); United States v. Mintmire, 507 F.3d 1273, 1293-94 (11th Cir. 2007) (delineating this provision as an affirmative defense that, once raised, must be disproved by the Government beyond a reasonable doubt).

65. *See* United States v. Kloess, 251 F.3d 941, 949 (11th Cir. 2001).

66. *In re* Williams, 414 N.W.2d 394, 397 (Minn. 1987). Condemnation of what some would term "excessive" zealous representation has been also found in legal scholarship. *See, e.g.*, Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990).

statutes and the absence of evidentiary relevance, the conduct described in the hypothetical cannot be undertaken.

E. The "Collateral Damage" Issues

The conclusion of this "rumination" is that the conduct posited in the hypothetical may not be undertaken. While that should end the inquiry, an examination is due into what might transpire if an attorney concludes otherwise, and deems this to be a "gray area" with sufficient leeway to permit the asking of the fear-triggering question. Beyond the risk to the attorney in terms of disciplinary or possible criminal charges, two additional concerns arise.

Should the tactic succeed, and the child "freeze" and be declared unavailable as a witness, the prosecution may seek a determination that this resulted from defense "wrongdoing," thereby entitling it to admit an abundance of hearsay. In *Giles v. California*,[67] the Court held that a defendant forfeits the right to claim a violation of the Confrontation guarantee where the accused has procured the witness' unavailability with the intent to prevent the witness from testifying.[68] That conduct permits the admission of "testimonial" hearsay, i.e., hearsay normally inadmissible under a Confrontation Clause analysis absent unavailability and an opportunity to cross-examine at the time the original declaration was made.[69] Because the attorney is acting as the client's agent and also may be acting at the client's urging, and with a singular intent – ensuring that the child does not testify – forfeiture may be found and the accused then will be subject to trial by non-cross-examined hearsay.[70] The second consequence of note is how the jury will perceive such an approach to the child witness (assuming the questioning occurs in the jury's presence, and not in a pre-trial competence or taint hearing). Studies have shown that cross-examination perceived as causing a child to be confused (as when complex questions are deployed) correlates with an increase in prosecution verdicts in criminal trials.[71] The same may be true where counsel intimidates the child into unavailability.

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67. 554 U.S. 353 (2008).

68. *Id.* at 361.

69. Crawford v. Washington, 541 U.S. 36, 59 (2004) ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.").

70. It is of no moment that the act that procured unavailability is itself lawful – the posing of a question. *Cf.* Commonwealth v. Szerlong, 933 N.E.2d 633, 638, 640-41 (Mass. 2010) (holding conduct of defendant – marrying victim of crime, and then colluding with her in order to have her invoke her spousal privilege not to testify – constituted forfeiture by wrongdoing).

71. Angela D. Evans, Kang Lee & Thomas D. Lyon, *Complex Questions Asked by Defense Lawyers But Not Prosecutors Predicts Convictions in Child Abuse Trials*, 33 LAW & HUM. BEHAV.

F. Conclusion

That there are gray areas in the realm of professional conduct cannot be denied, which has led some commentators to acknowledge the utilization of subjective standards—whether the behavior of the attorney passes the "smell"[72] or "the stomach tightening" test.[73] Here, what can be concluded is that *when informed by considerations of relevance and criminal law*, the Model Rules ultimately provide the answer to the hypothetical. Whether a concussive physical act or a concussive question, when there is no evidentiary relevance and the intent is to procure unavailability, the conduct is banned. That this leaves tremendous opportunity for zealous advocacy, even with the heightened stakes in a trial for charges of child abuse, is without doubt. The law provides numerous legal grounds to put the state to its case, and cross-examine to expose frailties, inconsistencies, and biases. But an attack on the right to testify based on extra-legal matters has no place in the courtroom, or in any lawyer's arsenal.

258, 262 (2008), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1057&context=thomaslyon.

72. "The smell test is hard to beat. When in doubt--don't." Robert D. Taichert, Ethical Issues in Advising Professional Practices and Health Care Clients (Including Liaiblity Concerns): Ways to Deal with the Risks of Criminal Charges in Advising and Drawing Contracts for Managed Care Networks; A Look at Recent Cases, in 2 ALI-ABA COURSE OF STUDY MATERIALS: QUALIFIED PLANS, PROFESSIONAL ORGANIZATIONS, HEALTH CARE, AND WELFARE BENEFITS (1999).

73. Eleanor W. Myers, *"Simple Truths" About Moral Education*, 45 AM. U. L. REV. 823, 847 n.120 (1996).