

7-11-2022

Give 'Em the Ol' Razzle Dazzle: The Ethics of Trial Advocacy and the Case of Kyle Rittenhouse

David A. Lord

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

27 Suffolk J. Trial & App. Advoc. 205 (2021-2022)

This Article is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

ARTICLE

**GIVE ‘EM THE OL’ RAZZLE DAZZLE: THE
ETHICS OF TRIAL ADVOCACY AND THE CASE
OF KYLE RITTENHOUSE**

David A. Lord¹

I.INTRODUCTION	206
II.BACKGROUND: THE CASE OF KYLE RITTENHOUSE.....	209
III.OPENING STATEMENT	210
A. Impermissible Rhetoric and Argumentation	211
B. Misuse of the Opening Statement to Expose the Jury to Inadmissible Evidence.....	212
C. Vouching for Witnesses or Asserting Personal Opinions	216
IV.DIRECT EXAMINATIONS.....	219
A. Candor to the Court.....	219
B. Witness Coaching	221
V.CROSS-EXAMINATION.....	224
A. Cross Without Foundation	225
B. Invading the Province of the Jury	228
C. Comments on a Defendant’s Right to Remain Silent	230
VI.CLOSING	234
A. Use of Religious, Moral, and Other Inflammatory Rhetoric	234
B. Attacking the Other Side.....	236
VII.CONCLUSION	239

¹ Copyright © 2021 David A. Lord. David A. Lord is the Deputy Commonwealth’s Attorney for Alexandria, Virginia and has been a prosecutor for sixteen years. In addition to supervising other attorneys, David is an experienced litigator, having tried fifty-seven cases before juries and an immeasurable number of bench trials. David has focused on legal ethics for much of his career, teaching prosecutorial ethics and lecturing regularly in the area. He has also authored a law review article on the ethics of plea bargaining in criminal cases that is scheduled for publication in *The Georgetown Journal of Legal Ethics* in 2022.

I. INTRODUCTION

“Don’t get brazen with me!” Judge Bruce Schroeder shouted at the prosecutor as he admonished him for purported misconduct in the high-profile murder trial against Kyle Rittenhouse.² Our nation’s attention was recently captivated by this case, which involved a seventeen-year-old defendant charged with homicide after he shot and killed two individuals during a protest against police brutality.³ While the jury eventually acquitted Rittenhouse, the outcome of the case was initially uncertain due to alleged prosecutor misconduct at trial.⁴ For example, the prosecution reportedly commented on Mr. Rittenhouse’s invocation of his right to remain silent following his arrest.⁵ The trial judge subsequently admonished the prosecutor, saying:

I was astonished when you began your examination by commenting on the defendant’s post-arrest silence . . . that’s basic law. It’s been basic law in this country for 40 years, 50 years. I have no idea why you would do something like that. You know very well that an attorney can’t go into these types of areas when the judge has already ruled, without asking outside the presence of the jury to do so.⁶

The prosecution also attempted to question Rittenhouse about evidence that the judge had previously deemed inadmissible⁷ and sought to introduce evidence in contravention of the judge’s earlier ruling excluding

² See Katherine Fung, *Rittenhouse Trial Heats up as Judge Screams at Prosecution: ‘Don’t Get Brazen With Me’*, NEWSWEEK (Nov. 10, 2020), <https://www.newsweek.com/rittenhouse-trial-heats-judge-screams-da-dont-get-brazen-me-1648027>.

³ See Teo Armus et. al., *Before a Fatal Shooting, Teenage Kenosha Suspect Idolized the Police*, WASH POST (Aug. 27, 2020), <https://www.washingtonpost.com/nation/2020/08/27/kyle-rittenhouse-kenosha-shooting-protests/>. Rittenhouse was also accused of shooting, but not killing a third person. *Id.*

⁴ See Maya Yang, *Kyle Rittenhouse Lawyers Seek Mistrial as Judge Upbraids Prosecution*, THE GUARDIAN (Nov. 10, 2021), <https://www.theguardian.com/us-news/2021/nov/10/kyle-rittenhouse-trial-kenosha-wisconsin-testimony>.

⁵ *See id.*

⁶ See Louis Caslano, *Prosecutors Could be Barred from Re-trying Rittenhouse if Prosecutors Intentionally Caused Mistrial: Expert*, FOX NEWS (Nov. 10, 2021), <https://www.foxnews.com/us/rittenhouse-mistrial-expert>.

⁷ See Caitlin Dickson, *‘Don’t Get Brazen with Me!’: Rittenhouse Judge Snaps at Prosecutor as Defense Requests a Mistrial*, YAHOO NEWS (Nov. 10, 2020), <https://news.yahoo.com/dont-get-brazen-with-me-rittenhouse-judge-snaps-at-prosecutor-as-defense-requests-a-mistrial-225840138.html>. The prosecution tried to ask Rittenhouse about a video taken weeks before the shooting in which he said the following about purported shoplifters: “Bro, I wish I had my f***ing AR. I’d start shooting rounds at them.” *Id.*

such evidence.⁸ In response to the defense attorney's motion for a mistrial, the prosecutor claimed to have acted in good faith, to which the judge responded, "When you say you were acting in good faith, I don't believe that."⁹ If a mistrial with prejudice had been granted based on the prosecutor's alleged misconduct, it would have represented an astonishing outcome in a case with a great deal of public attention.

As a prosecutor, I have tried murder cases which garnered significant amounts of press coverage and felt tremendous pressure to keep the community safe and achieve justice. I was acutely aware that every step (and misstep) I made in court could become the next day's headline or feature story on the five o'clock news. The pressure of litigation makes it tempting to blur ethics lines out of a desire to win—a desire that is natural in an adversarial system.

Litigators are trained to be fierce advocates for their clients in the courtroom; but when a trial becomes focused on the theatrical performance of the attorneys, a dangerous line is crossed. One is reminded of the scene from the musical *Chicago*, where Billy Flynn, the flamboyant attorney representing accused murderess Roxie Hart, tries to comfort his client prior to her trial.¹⁰ Flynn explains the idea of a trial by saying, "You got nothing to worry about. It's all a circus, kid. A three-ring circus. This trial—the world—all show business. But kid, you're working with a star, the biggest!"¹¹ Flynn then sings the catchy song "Razzle Dazzle," which explains how a trial attorney can distract the jury from the evidence if the lawyer puts on a flashy show.¹² "How can they hear the truth above the roar?" Flynn asks.¹³

While a Broadway musical may not capture the heart of daily litigation in America, it points to a well-known danger. In its ideal form, "A criminal trial, like its civil counterpart, is a quest for the truth;"¹⁴ but this quest for truth is undermined when the trial shifts its focus from evidence and controlling law and instead centers on emotional appeals to the jury or theatrical performances by trial counsel. A lawyer who crosses ethical constraints on trial advocacy may also commit a grave disservice to their client's interests.

⁸ *See id.* The prosecution tried to introduce a photo of Rittenhouse with members of a white nationalist group. *Id.*

⁹ *See id.*

¹⁰ *See* CHICAGO (Rob Marshall, dir. 2002).

¹¹ *See id.*

¹² *See id.*

¹³ *See id.*

¹⁴ *See* Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966).

If a mistrial had been granted in the case of Kyle Rittenhouse, for example, the state's interests would be undermined at the hands of its own attorney.¹⁵

This article will explore the dangers of trial theatrics at the four primary stages of trial: opening statement, direct examination, cross-examination, and closing argument. It will address the established constitutional and ethical norms that exist to create guardrails against the derailment of the trial through theatrics. This article then posits that only strict adherence to these norms will enable a court to fulfill its role as a facilitator for the quest for the truth. The trial of Kyle Rittenhouse will be discussed throughout this article to demonstrate how ethical issues of attorney theatrics arise and are addressed.

This article will begin with a brief overview of the facts that led to the Rittenhouse trial. Additional information about the case, such as pretrial motions and objections, will be considered at various points throughout this piece. The article will then examine the ethics of trial advocacy during each of the four trial stages and how some of these issues arose in the case against Mr. Rittenhouse. The section on opening statements will focus on the use of impermissible rhetoric and argumentation, misuse of the opening statement to expose the jury to inadmissible evidence, and the improper use of an opening statement to vouch for the credibility of witnesses. The next section examines ethical issues in an attorney's presentation of their witnesses, as well as what an attorney must do when their witness lies on the stand, and the dangers of "coaching" a witness. Next, the article will examine ethical landmines in the cross-examination of opposing witnesses. This section includes a discussion of cross-examination based on an insufficient foundation, cross-examination that seeks to improperly invade the province of the jury, and then, specific to criminal law, cross-examination in which a prosecutor improperly comments on a defendant's invocation of their right to remain silent. The final section of this paper addresses the closing argument. The section begins with a discussion of the use of improper rhetoric and examines the misuse of moral, religious, and otherwise inflammatory language. The section closes by noting the ethical and constitutional constraints on

¹⁵ See *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982) (explaining Double Jeopardy Clause). The Double Jeopardy Clause of the Fifth Amendment protects a defendant against repeated prosecutions for the same offense. *Id.* When a mistrial is ordered on the motion of the defendant, when deciding whether retrial is prohibited by the Double Jeopardy Clause, the court looks to whether governmental actions intended to provoke the mistrial request. *Id.* at 674. "[The Double Jeopardy Clause] bars retrial where 'bad-faith conduct by judge or prosecutor,' threatens the [h]arassment of an accused by successive prosecutions or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." *Id.* (quoting *United States v. Dinitz*, 424 U.S. 600, 611 (1976)). "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id.* at 676.

attorneys who seek to attack the opposing side, including counsel and their witnesses. At each of these stages, an attorney's indulgence in theatrical presentation can harm the court's ability to facilitate the quest for the truth. By moving the focus of the trial away from the performance of trial counsel and back towards the evidence and controlling law, this danger can be minimized.

II. BACKGROUND: THE CASE OF KYLE RITTENHOUSE

On August 23, 2020, Jacob Blake, a twenty-nine-year-old Black man, was shot in the back seven times by a white police officer in Kenosha, Wisconsin.¹⁶ Mr. Blake was left partially paralyzed.¹⁷ The shooting was captured by a neighbor through a video which was widely circulated, garnering public outrage.¹⁸ The shooting of Mr. Blake was one of many recent high-profile incidents involving Black individuals harmed or killed during encounters with the police.¹⁹

The shooting was followed by multiple nights of protest involving hundreds of demonstrators, the deployment of the Wisconsin National Guard, and the imposition of a curfew.²⁰ Media reports described the destruction of property during these protests, including a furniture store and downed streetlamps.²¹

Kyle Rittenhouse, a seventeen-year-old from Illinois whose social media presence demonstrated a support of law enforcement, came with a firearm to the scene of the protests.²² While there, Rittenhouse shot and killed two men, Joseph Rosenbaum and Anthony Huber, and injured a third man, Gaige Grosskreutz.²³ In a video interview conducted shortly before the shooting, Rittenhouse appeared in front of a boarded-up business and said:

¹⁶ See Christina Morales, *What We Know About the Shooting of Jacob Bake*, N.Y. TIMES (Nov. 16, 2021), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html>.

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ See Julie Bosman & Sarah Mervosh, *Wisconsin Reels After Police Shooting and Second Night of Protests*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/2020/08/24/us/kenosha-police-shooting.html>.

²¹ *See id.*

²² See Haley Willis et. al., *Tracking the Suspect in the Kenosha Shooting*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/27/us/kyle-rittenhouse-kenosha-shooting-video.html>.

²³ See Minyvonne Burke, *Kyle Rittenhouse, Charged with Killing 2 Kenosha Protestors, Has Bond Set at \$2M*, NBC NEWS (Nov. 3, 2020), <https://www.nbcnews.com/news/us-news/kyle-rittenhouse-charged-killing-2-kenosha-protesters-has-bond-set-n1245953>.

So people are getting injured, and our job is to protect this business And part of my job is to also help people. If there is somebody hurt, I'm running into harm's way. That's why I have my rifle—because I can protect myself obviously. But I also have my med kit.²⁴

Videos posted to social media showed shots ringing out in a car lot before a man was discovered with a gunshot wound to the head.²⁵ Rittenhouse was heard saying, “I just killed somebody” as he jogged away from the scene.

Rittenhouse was ultimately charged with seven offenses: first-degree homicide, use of a dangerous weapon; first-degree recklessly endangering safety, use of a weapon; first-degree intentional homicide, use of a dangerous weapon; attempted first-degree intentional homicide, use of a dangerous weapon; first-degree recklessly endangering safety, use of a dangerous weapon; possession of a dangerous weapon by a person under 18; and a curfew violation.²⁶ The curfew violation and underage possession of a firearm charges were dropped by the judge during the course of the trial and were not considered by the jury.²⁷ As to the other charges, Rittenhouse claimed that he acted in self-defense.²⁸

III. OPENING STATEMENT

An attorney's opening statement sets the tone for a trial and is the first meaningful opportunity to preview the case for the jury.²⁹ Naturally, both sides want to maximize the impact of their opening statements on the decision maker's disposition towards the case. This desire gives rise to three specific temptations which may present ethical problems in the court room. The first of these is the use of improper rhetoric—in other words, the use of an impermissible argument or inflammatory language. The second is the

²⁴ See NBC Chi., *Who is Kyle Rittenhouse? What We Know About the 17-Year-Old Arrested in Kenosha Shooting*, NBC NEWS (Aug. 27, 2020), <https://www.nbcchicago.com/news/local/who-is-kyle-rittenhouse-what-we-know-about-the-17-year-old-arrested-in-kenosha-shooting/2329610/>.

²⁵ See *id.*

²⁶ See Clare Hymes, *Everything We Know About the Kyle Rittenhouse Trial*, CBS NEWS (Nov. 16, 2021), <https://www.cbsnews.com/news/kyle-rittenhouse-trial-timeline/>.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See Allison Leotta, *6 More Leading Trial Lawyers Share Secrets of Effective Opening Statements*, A.B.A. J. (Mar. 1, 2017), https://www.abajournal.com/magazine/article/trial_lawyers_best_opening_statements (“Many of us heard this advice for the first time from our mothers: ‘You don’t have a second chance to make a first impression.’ Opening statements are likely the first time (except for the rare attorney *voir dire*) a jury will hear a client’s story and your voice.”)

misuse of the opening statement to expose the jury to inadmissible evidence. Since claims made in opening statements are not vetted through the rules of evidence or by objections from opposing counsel, an attorney may be tempted to “poison the well” by introducing the jury to prejudicial information that would be inadmissible at trial, or by referencing facts that cannot be supported through admissible testimony. The final temptation involves vouching for the credibility of witnesses or asserting a personal opinion about the case. Each temptation highlights the overall danger of which this article warns—when the theatrical nature of litigation runs rampant, the court’s quest for the truth is threatened. It is only through the rigorous enforcement of ethical and constitutional norms that this danger be avoided.

A. Impermissible Rhetoric and Argumentation

While impermissible rhetoric is addressed later in this article, it is important to consider the issue when discussing opening statements. It is easy to dismiss some misplaced trial rhetoric as “a few injudicious words” uttered in the heat of battle;³⁰ but this argument falls flat for opening statements because the battle “has yet to be joined” and such statements are prepared in advance with deliberation and thought.³¹ Rhetoric in an opening statement crosses the line of permissibility when it is not a summary overview of the evidence, but rather commentary, and thus argument, on the evidence itself. The proper time and place for commentary on evidence is during summation in the closing argument, where an attorney is permitted to focus the jury’s attention on the trial evidence and the inferences to be drawn therefore.³²

Neither should an opening statement contain “unnecessary, overly dramatic characterizations.”³³ An example of an overly dramatic characterization is a statement that a defendant in a tax evasion case “could not have done a more effective job of getting money . . . if he had went out and bought a mask, got an acetylene torch . . . and blown the vault door open.”³⁴ This type of assertion could be viewed as an attempt to prejudice the jury against the other side by destroying their credibility.³⁵

³⁰ See *United States v. DeRosa*, 548 F.2d 464, 469 (3d Cir. 1977).

³¹ See *id.*

³² See *id.* at 470 (internal citations omitted).

³³ See *id.* (citing *United States v. Somers*, 496 F.2d 723, 738 (3d Cir. 1974)).

³⁴ See *United States v. Singer*, 482 F.2d 394, 398 (6th Cir. 1973).

³⁵ See *id.* at 398-99 (first citing *Government of Virginia Islands v. Turner*, 409 F.2d 102, 103 (1st Cir. 1969); and then citing *Leonard v. United States*, 277 F.2d 834, 841-42 (9th Cir. 1960)).

This leads to the natural question— what *is* an argument that would render an opening statement problematic? One author, finding case law and trial advocacy law books insufficient in answering this question, interviewed experienced litigators in the field and constructed guidance for determining when an opening statement becomes argumentative.³⁶ To avoid becoming argumentative, a litigator should: (1) use only facts that will clearly be deemed admissible; (2) avoid all reference to matters beyond the case at hand; (3) refrain from attacking the opponent’s motive or integrity; (4) leave it to closing to address *why* their side is correct; and (5) avoid vouching for their side’s witnesses and overtly attacking their opponent’s.³⁷

B. Misuse of the Opening Statement to Expose the Jury to Inadmissible Evidence

In its ideal form, the opening statement is an objective summary of the evidence reasonably expected to be produced; it should not be used as an opportunity to “poison the jury’s mind” against the other side or “to recite items of highly questionable evidence.”³⁸ Courts recognize that attorneys may be tempted “to capitalize on evidence which [is] inadmissible because of a technicality.”³⁹ In other words, a litigant who is prohibited from presenting a pertinent fact due to a legitimate evidentiary objection might wish to reference this fact in an opening statement, hoping that it seeps into the subconscious of the jury. Trying to “side-step” the rules of evidence in this way undermines the purpose of the rules, which is to “administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”⁴⁰

When a prosecutor acts in bad faith by making a claim in an opening statement that is not supported by admissible evidence, it may result in a mistrial.⁴¹ In federal civil cases, the test for determining whether improper

³⁶ See Jules M. Epstein, *Opening Statement v. Argument—Where is the Line*, TEMP. UNIV. BEASLEY SCH. OF L.: ADVOC. & EVIDENCE BLOG, <https://www2.law.temple.edu/aer/opening-statement-v-argument-where-is-the-line/> (last visited May. 12, 2022).

³⁷ See *id.*

³⁸ See *United States v. Brockington*, 849 F.2d 872, 874 (4th Cir. 1988) (quoting *United States v. DeRosa*, 548 F.2d 464, 470 (3d Cir. 1977)) (identifying a prosecutor’s comment in opening as improper, but not to the point of warranting reversal, that a picture of the defendant with heavy gold jewelry was the kind of item specifically worn by drug dealers).

³⁹ See *United States v. Novak*, 918 F.2d 107, 110 (10th Cir. 1990).

⁴⁰ See FED. R. EVID. 102.

⁴¹ See *e.g.*, *Novak*, 918 F.2d at 109-10 (analyzing whether a “prosecutor’s failure to introduce facts a trial supporting statements made during opening argument should result in a mistrial). When

remarks by counsel should result in a new trial is found in *Ventura v. Kyle*.⁴² This test focuses on whether (1) the remarks were minor aberrations made in passing; (2) whether the court took specific curative action; and (3) whether the size of the damage award suggests that the improper comments had a prejudicial effect.⁴³ While *Ventura* addressed improper comments during closing, the principle at issue is the same—when an attorney makes statements that put inadmissible evidence before the jury, it is ethically impermissible and jeopardizes their client's case.

The facts of the *Ventura* case provide an example of impermissible comments that may prejudice the jury. This case involved a defamation claim asserted by the colorful former Governor of Minnesota and professional wrestler, Jesse Ventura, against an author who wrote a book about Ventura.⁴⁴ Counsel for the plaintiff, relying solely on witnesses' denial of knowledge regarding whether the publisher was insured, argued that the witnesses were biased because it was, "hard to believe they didn't know about the insurance policy[.]"⁴⁵ In its opinion, the court noted that it would be difficult to view this comment as anything other than a deliberate and strategic choice to influence damages by referencing an impersonal deep-pocket insurer—a fact which was both inadmissible if true, and not proven in any event.⁴⁶ Noting that it is repugnant to a fair trial for a jury to allow the plaintiff to recover under these circumstances, the court reversed the verdict.⁴⁷

Practical problems also arise when an attorney references testimony in an opening statement that is never introduced at trial. In *Ouber v. Guarino*, the First Circuit considered this issue when reviewing an inmate's *habeas corpus* petition alleging ineffective assistance of counsel.⁴⁸ During the opening statement, counsel for the defense promised four times that the defendant would testify, emphasizing the importance of this testimony in ascertaining whether she knew that envelopes she had delivered contained cocaine.⁴⁹ The defense ultimately elected not to call the defendant to the stand and the defendant was convicted.⁵⁰ When determining whether the verdict should be overturned, the court first considered the defense attorney's

considering this issue the court looks to whether the prosecutor acted in good faith and the impact the statements had on the trial. *See id.* at 109.

⁴² 825 F.3d 876 (8th Cir. 2015).

⁴³ *See Ventura v. Kyle*, 825 F.3d 876, 885 (8th Cir. 2015).

⁴⁴ *See id.* at 878-82.

⁴⁵ *See id.* at 881.

⁴⁶ *See id.* at 885.

⁴⁷ *See Ventura*, 825 F.3d at 886 (citing *Halladay v. Verschoor*, 381 F.2d 100, 112 (8th Cir. 1967)).

⁴⁸ *See Ouber v. Guarino*, 293 F.3d 19, 20 (1st Cir. 2002)

⁴⁹ *See id.* at 22.

⁵⁰ *See id.* at 23.

conduct during trial.⁵¹ The court reasoned that the decision to present the defendant's testimony as the centerpiece of the defense, and then to subsequently advise his client against testifying, could not be seen as part of reasoned trial strategy and thus constituted an error in professional judgment.⁵² However, the court noted that only the most inexcusable misstep by trial counsel would lead to a finding that performance was so deficient that the defendant did not have adequate representation.⁵³ The court ultimately concluded that, "counsel committed an obvious error, without any semblance of a colorable excuse."⁵⁴ When examining whether counsel's misstep prejudiced the case, the court noted that the jury was deadlocked before eventually reaching the verdict.⁵⁵ Given how close the case was, the error, while arguably small, was rather monumental.⁵⁶ Accordingly, the verdict was set aside because of this deficiency.⁵⁷ Promising a jury certain testimony and then not presenting it can lead the jury to question the integrity of one side or to assume that testimony would have been damaging.⁵⁸ *Ouber* highlights how a broken promise made in opening can be detrimental to a client's case.

It is important to note that discussing otherwise inadmissible evidence in opening allows the opposing party to admit evidence on the same subject.⁵⁹ For example, referencing an inadmissible out-of-court statement of a witness may allow the opposing side to introduce the statement or testimony about it.⁶⁰ Similarly, calling a witness a liar in opening statement may justify the introduction of testimony that bolsters that witness's credibility.⁶¹

It is clearly established in case law that a lawyer cannot use the opening statement as an opportunity to present evidence that will not later be admitted. This rule is also codified in the Rules of Professional Conduct, which states that a lawyer at trial shall not "allude to any matter the lawyer does not reasonably believe is relevant or that will be supported by admissible

⁵¹ See *id.* at 25 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

⁵² See *Ouber*, 293 F.3d at 27.

⁵³ See *id.* at 27.

⁵⁴ See *id.* at 32.

⁵⁵ See *id.* at 33.

⁵⁶ See *id.*

⁵⁷ See *Ouber*, 293 F.3d at 35.

⁵⁸ See *United States v. Gonzalez-Maldonado*, 115 F.3d 9, 15 (1st Cir. 1997) ("A defendant's opening statement prepares the jury to hear his case. If the defense fails to produce promised expert testimony that is critical to the defense strategy, a danger arises that the jury will presume the expert is unwilling to testify and the defense is flawed.")

⁵⁹ See *United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000).

⁶⁰ See *id.*

⁶¹ See *United States v. Croft*, 124 F.3d 1109, 1120 (9th Cir. 1997) (citing *United States v. Santiago*, 46 F.3d 885, 891 (9th Cir. 1995)).

evidence[.]”⁶² To prevent the misuse of an opening statement by opposing counsel, litigators may file a motion *in limine*.⁶³

Attorneys frequently find themselves in situations where the opposing counsel persistently solicits prejudicial evidence which, although logically relevant, is not legally relevant. When this situation arises, the attorney is faced with the dilemma of either continually objecting to the evidence, thereby arousing the suspicions of the jury and creating additional prejudice, or not objecting to the evidence, thereby waiving the right to raise the issue in a motion for a new trial or on appeal. To avoid facing this double-edged sword, many experienced trial attorneys employ a relatively new procedural device: the motion *in limine*.⁶⁴

In addition to preventing the opposing side from introducing prejudicial testimony, a successfully argued motion *in limine* precludes the opposing side from referencing the evidence in their opening statement.⁶⁵

This tactic was used successfully by Kyle Rittenhouse’s attorneys when they moved to exclude evidence of a video taken prior to the shooting, where Mr. Rittenhouse made statements intimating a predisposition for violence.⁶⁶ The defense also filed a motion seeking to prevent the prosecution from introducing evidence that the defendant was affiliated with the group known as the Proud Boys.⁶⁷ The prosecutor wanted to argue that

⁶² See MODEL RULES OF PROF. CONDUCT r. 3.4 (AM. BAR ASS’N 2020) [hereinafter MODEL RULES].

⁶³ See *In limine*, BLACK’S LAW DICTIONARY (9th ed. 2009) (stating motion *in limine* is one that is raised prior to trial “because of an issue about the admissibility of evidence believed by the movant to be prejudicial”).

⁶⁴ See Johnny K. Richardson, *Use of Motions in Limine in Civil Proceedings*, 45 MO. L. REV. 130, 130 (1980).

⁶⁵ See *United States v. Novak*, 918 F.2d 107, 109 (10th Cir. 1990) (explaining counsel may generally refer to evidence in their opening statement which they reasonably expect to be introduced). Consider a situation where there is prejudicial evidence at issue and the parties have not litigated the admissibility of that evidence through a motion *in limine*. The proponent of the evidence is theoretically justified in referencing the testimony in the opening statement, assuming they have a reasonable belief that the evidence will be admitted. If that belief is incorrect and the testimony is later excluded, the minds of the jury may be poisoned by hearing about the evidence, even though it was never actually admitted at trial. Successfully precluding references to the evidence in the motion *in limine* can protect against this harm.

⁶⁶ See discussion *infra* Section V, Subsection A. This motion will be discussed in-depth later in this article in the portion discussing cross-examination without foundation.

⁶⁷ See Todd Richmond, *Judge: Prosecutor’s Can’t Show Rittenhouse Link to Proud Boys*, AP NEWS (Sept. 17, 2021), <https://apnews.com/article/wisconsin-police-trials-gun-politics-kenosha-8cd887f731ace320bf945f9524ceb252>.

Rittenhouse, who had been seen at a bar with members of this white nationalist group, shared in its “white supremacist philosophies and violent tactics.”⁶⁸ The defense argued that the racial overtones of the original protests notwithstanding, there was insufficient evidence connecting him to the Proud Boys and no evidence that the shootings were racially motivated, as the men he shot at were white.⁶⁹ The judge agreed with the defense and excluded the testimony.⁷⁰ Had this motion not been successfully raised by the defense, the prosecution could have referenced these facts in its opening statement, implying to the jury that the defendant was associated with a group most people detest.

C. Vouching for Witnesses or Asserting Personal Opinions

The Rules of Professional Conduct prohibit attorneys from “asserting personal knowledge of facts in issue” or stating “a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused.”⁷¹ Behavior which violates this norm can take two related forms. The first is “vouching”⁷² for a witness—in other words, stating a personal opinion as to the credibility of a witness. The second is stating a personal opinion about the case more broadly. As a preliminary matter, it is worth noting that these admonitions are not restricted to the opening statement alone and apply throughout the trial. Thus, the problems associated with engaging in this type of conduct can occur in the opening statement as well as the closing argument.

When an attorney inserts their personal knowledge and views into the case, they lend their own credibility to the witnesses and evidence, potentially distracting and swaying the jury. The danger of this is even greater when the vouching is done by a prosecutor, as a prosecutor’s opinion, “carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.”⁷³ When an attorney states a personal opinion, they can also convey the impression that evidence not presented to the jury, but known to the attorney,

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See* MODEL RULES r. 3.4.

⁷² *See* United States v. Alcantara-Castillo, 788 F.3d 1186, 1191 (9th Cir. 2015) (declaring lawyers may not “vouch for a witness by offering their personal opinion of a witness’s testimony or suggesting that information exists outside the record that verifies the witness’s truthfulness”).

⁷³ *See id.* (quoting United States v. Reyes, 577 F.3d 1069, 1077 (9th Cir. 2009)).

supports that attorney's side, thus creating the risk that the case will not be tried solely on the basis of evidence presented in court.⁷⁴

The Supreme Court case of *Berger v. United States* highlights the danger of an attorney who uses trial theatrics to turn the attention of the jury from the evidence.⁷⁵ In *Berger*, the defendant's conviction was overturned because the federal prosecutor had, "overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer[.]"⁷⁶ Specifically, the Court took issue with the attorney's misstating facts during cross examination; "putting words" into the mouths of witnesses; referring to statements that had been made to him out of court without proof; pretending to understand a witness as saying something other than what they had said; assuming prejudicial facts not in evidence; bullying and arguing with witnesses; and "in general . . . conducting himself in a thoroughly indecorous and improper manner."⁷⁷ The Court found the attorney's presentation of the case "undignified and intemperate" because it contained improper insinuations and assertions that were calculated to mislead the jury.⁷⁸ The opinion further criticized the prosecutor's failed attempts to lead a witness who had trouble identifying the defendant, saying, "I was examining a women that I knew knew [the defendant] and could identify him, she was standing right here looking at him, and I couldn't say, 'Isn't that the man?' Now imagine that! But that is the rules of the game, and I have to play within those rules."⁷⁹ The Court noted that this insinuation invited the jury to conclude that the witness knew the defendant and that this was within the personal knowledge of the attorney. Because assertions of personal knowledge by an attorney are apt to carry weight with the jury, an attorney cannot express a personal opinion about a witness's credibility, guarantee their truthfulness, or imply that the attorney knows something the jury does not.⁸⁰

Admittedly, determining what constitutes impermissible vouching is often difficult. Generally, vouching occurs when an attorney asserts their

⁷⁴ See *Young v. United States*, 470 U.S. 1, 18 (1985).

⁷⁵ See *Berger v. United States*, 295 U.S. 78, 89 (1935).

⁷⁶ See *id.* at 79, 84.

⁷⁷ See *id.* at 84.

⁷⁸ See *id.* at 85.

⁷⁹ See *Berger*, 295 U.S. at 87.

⁸⁰ See *id.* at 88; see also *United States v. Roundtree*, 534 F.3d 876, 880 (8th Cir. 2008) (citing *United States v. Benitez-Meraz*, 161 F.3d 1163, 1167 (8th Cir.1998)). "Improper vouching may occur when the government expresses a personal opinion about credibility, implies a guarantee of truthfulness, or implies it knows something the jury does not." *Id.*; *United States v. Jones*, 468 F.3d 704, 707 (10th Cir. 2006)). "It is a due process error for a prosecutor to indicate 'a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony.'" *Id.* (quoting *United States v. Bowie*, 892 F.2d 1494, 1498 (10th Cir.1990)).

own viewpoint as to the credibility of a witness rather than drawing an appropriate inference from the evidence.⁸¹ Such a practice is impermissible because it introduces “credibility evidence that would have been inadmissible during trial.”⁸² Vouching and commentary is obvious when, for example, the attorney makes statements such as “I believe [Witness X] was credible” or “I don’t think [Witness Y] was truthful up here on the stand[.]”⁸³ Assertions that a witness was telling the truth or lying crosses the same line.⁸⁴ Implying that a witness would not have lied because of the ramifications of committing perjury poses similar issues, as it suggests that the attorney knows something about the consequences of lying that the jury does not.⁸⁵ An attorney’s discussion of a witness’s motivation for testifying or the safeguards established to ensure that a witness does not lie, however, do not constitute impermissible vouching.⁸⁶ This could include referring to a witness as “meticulous,” as long as the attorney reviews the witness’s testimony in context and does not otherwise personally endorse such testimony.⁸⁷

Interestingly, it was the judge the Rittenhouse case, and not the attorneys, who vouched for a witness.⁸⁸ On Veteran’s Day, the judge asked if there were any veterans on the jury or elsewhere in the courtroom.⁸⁹ He then noted that the defendant’s next witness, John Black, was a veteran and encouraged everyone to, “give a round of applause to the people who have served our country.”⁹⁰ Legal experts noted that this may have encouraged jurors to view the witness more favorably.⁹¹ This highlights the particular dangers of vouching—rather than leaving the issue of the credibility to the

⁸¹ See *United States v. Andreas*, 216 F.3d 645, 671-72 (7th Cir. 2000) (describing two interpretations of prosecutor’s statement). In *Andreas*, the prosecutor stated that the case against the defendant was “one of the most compelling and powerful that has ever been presented in an American courtroom.” *Id.* The court noted that this comment could be interpreted as either a remark on the strength of the evidence or as the prosecutor expressing a personal opinion about the strength of the evidence. *Id.*

⁸² See *id.* at 671.

⁸³ See *United States v. Green*, 119 Fed. Appx. 133, 134 (9th Cir. 2004) (overturning a defendant’s convictions because of impermissible vouching by the prosecutor).

⁸⁴ See *United States v. Weatherspoon*, 410 F.3d 1142, 1147 (9th Cir. 2005).

⁸⁵ See *id.* at 1146 (citing *United States v. Combs*, 379 F.3d 564, 574-76 (9th Cir. 2004)).

⁸⁶ See *Bass v. United States*, 655 F.3d 758, 761 (8th Cir. 2011) (“Although attempts to bolster a witness by vouching for his credibility are normally improper, the government may explain why the jury might find the government’s witnesses credible” (citing *United States v. Roundtree*, 534 F.3d 876, 880 (8th Cir. 2008))).

⁸⁷ See *id.*

⁸⁸ See Nicholas Bogel-Burroughs, *In Scrutinized Kyle Rittenhouse Trial, It’s the Judge Commanding Attention*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/us/kyle-rittenhouse-judge-bruce-schroeder.html>

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

jury, one of the trial “actors” linked his own credibility to a witness, potentially skewing the jury’s analysis of the witness’s testimony.

IV. DIRECT EXAMINATIONS

When an attorney determines which witnesses to call to the stand and what questions to ask, they are writing the script that the jury will hear during trial. While a skilled attorney seeks to narrate a compelling story to maintain the jury’s attention, too much drama may detract from the truth. When calling witnesses to the stand and examining them, there are two major ethical issues that may arise. The first involves an attorney’s duty of candor to the court, including what the lawyer must do when their witness tells a lie from the stand. The second concerns “coaching” and how an attorney should properly prepare a witness for testifying.

A. *Candor to the Court*

When I teach ethics to newer prosecutors, I ask what they must do when their witness lies on the stand. They often respond that they should tell the defense attorney. While this is a good instinct, it is an insufficient response because it only satisfies an attorney’s ethical obligations to opposing counsel, not to the court. The Rules of Professional Conduct outline three strict rules involving an attorney’s candor to the court: (1) a lawyer must not make a false statement of fact or law to the court and must correct one previously made; (2) a lawyer must disclose controlling legal authority adverse to their position that is not disclosed by the other side; and (3) a lawyer must not offer evidence that the lawyer knows to be false.⁹² With respect to the last of these, the rules further note that if the lawyer learns of false testimony by their client or witness, they shall “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”⁹³ Recognizing that false testimony might come from an attorney’s client and that disclosing the falsity could result in serious ramifications to the client, the official comments to the rule suggest a sequential three-part method for addressing a client’s false testimony.⁹⁴ First, the attorney should seek the client’s cooperation in withdrawing or correcting the false statement.⁹⁵ If that fails, the attorney should seek to withdraw from representing the client.⁹⁶ If

⁹² See MODEL RULES r. 3.3.

⁹³ See *id.*

⁹⁴ See *id.* at cmt 10.

⁹⁵ See *id.*

⁹⁶ See MODEL RULES r. 3.3

withdrawal is either not permitted or will not undo the effect of the false testimony, then the attorney must disclose the false testimony “as is reasonably necessary to remedy the situation,” even if it requires disclosure of privileged attorney-client communication.⁹⁷

The duty to correct a witness’s or client’s misrepresentation is ongoing and may continue beyond the immediate proceeding.⁹⁸ Moreover, failing to uphold the duty of candor to the court may subject the attorney to serious consequences, such as suspension. “[S]uspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that the material information is improperly being withheld, and takes no remedial action”⁹⁹ The attorney violating this norm may also be financially sanctioned and forced to pay attorney’s fees for the other side.¹⁰⁰ In one case, the Fourth Circuit offered blistering commentary regarding a prosecutor’s violations of the duty of candor.¹⁰¹ The court wrote:

Make no mistake, however. We may find such practices ‘harmless’ as to a specific defendant’s verdict, but as to litigants in the Eastern District of North Carolina and our justice system at large, they are anything but harmless. No one in this county is so high that she or he is above the law. No officer of the law may set that law in defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. The law of this country promises defendants due process, and the professional code to which attorneys are subject mandates candor to the court, and fairness to opposing parties. Yet the United States Attorney’s office in this district seems unfazed by the fact that the discovery abuses violate constitutional guarantees and misrepresentations erode faith that justice is achievable. Something must be done.¹⁰²

⁹⁷ *See id.*

⁹⁸ *See* *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 458 (4th Cir. 1993).

⁹⁹ *See* STANDARDS FOR IMPOSING LAW. SANCTIONS § 6.12 (AM. BAR ASS’N, amended 1992)).

¹⁰⁰ *See* *Six v. Generations Fed. Credit Union*, 891 F.3d 508, 510 (4th Cir. 2018) (upholding sanctions against an attorney who challenged the authenticity of a loan agreement for two years before revealing that they possessed an identical copy, obtained from their client, before filing the complaint).

¹⁰¹ *See* *United States v. Bartko*, 728 F.3d 327, 342 (4th Cir. 2013).

¹⁰² *See id.* at 342 (internal citation omitted).

The court then urged the district court to meet with the prosecutor's office to develop remedial procedures to correct these issues and directed the Clerk of Court to serve its opinion on the United States Attorney General and the Office of Professional Responsibility for the Department of Justice with a transmittal letter that "should call attention to this section of the opinion."¹⁰³

It is important to understand the rule requiring candor to the tribunal as part of a larger objective of preserving the integrity of the judicial system—it is not enough that the lawyer merely refrain from making affirmative misstatements.¹⁰⁴ For example, if, after filing pleadings based on the representations of a witness, an attorney later discovers that there are serious questions about that individual's credibility and allows the case to proceed unabated, that attorney has violated their duty of candor to the court.¹⁰⁵ In other words, an attorney cannot "shelter" themselves behind an argument that they do not have "actual knowledge" that a witness lied when they have a substantial reason to believe that is the case.¹⁰⁶ An attorney who, upon discovering issues undermining their witnesses' testimony, responds by failing to reveal it, obstructing the other side's ability to discover it, or continuing as if nothing has happened, can be rightfully sanctioned.¹⁰⁷ Upholding one's duty of candor to the court ensures that the trial avoids theatrics and focuses on the law and evidence. In a trial, the role of the witness in a proper proceeding is to speak the truth, not to simply provide the lines that will help its favored side prevail. It is the attorney's ethical duty to ensure that the witness' testimony is honest and not misleading.

B. Witness Coaching

While litigators are permitted to meet with their witnesses before trial and prepare for their testimony, there is a point where such preparation becomes coaching¹⁰⁸ "Coaching" is understood as an attorney's improper directing of a witness's testimony as to "have it conform with, conflict with, or supplement the testimony of other witnesses."¹⁰⁹ This may occur in a pretrial setting or during the witness's actual testimony. Where an attorney

¹⁰³ *See id.*

¹⁰⁴ *See United States v. Shaeffer Equip. Co.*, 11 F.3d 450, 458 (4th Cir. 1993).

¹⁰⁵ *See id.* at 459.

¹⁰⁶ *See id.*

¹⁰⁷ *See id.* at 461.

¹⁰⁸ *See Banks v. Thaler*, 583 F.3d 295, 322-23 (5th Cir. 2009); *United States v. Nambo-Barajas*, 338 F.3d 956, 962-63 (8th Cir. 2003).

¹⁰⁹ *See Crutchfield v. Wainwright*, 803 F.2d 1003, 1110 (11th Cir. 1986) (overturned on other grounds *United States v. Cavallo*, 790 F.3d 1202, 1217-18 (11th Cir. 2015)).

has “inappropriately ‘coached’ a witness, thorough cross-examination of that witness violates no privilege and is entirely appropriate to address the issue [of coaching].”¹¹⁰ If done correctly, such cross-examination can determine the extent of the coaching and develop a sufficient record that can be used to question the witness’s credibility.¹¹¹ But while cross-examination plays an important role in preventing coaching, it is not a complete answer. The availability of a sequestration order under rules of evidence demonstrates “that cross-examination may not be wholly sufficient to safeguard the truth-finding function in all circumstances.”¹¹²

It should also be noted that an attorney’s actions while engaging the witness on the stand may constitute coaching. “Head-nodding and eye movements . . . theoretically can cross the line and constitute improper vouching.”¹¹³ While nodding as a witness speaks may be unintentional, it has the potential to enter into the realm of coaching when it becomes “unprofessional and inappropriate.”¹¹⁴ Conduct such as providing a highlighted transcript to a witness with suggested language similarly constitutes coaching.¹¹⁵

The Fifth Circuit has suggested that, to prepare witnesses without coaching, an attorney should allow the witness to provide their version of what occurred without suggestion and then “probe, test, and further explore any portions of that version that may be inconsistent with the witness’[s] earlier statements, or other expected evidence.”¹¹⁶ Coaching occurs when the witness is pressured or pushed into changing their story, such that coercion has occurred.¹¹⁷

Impermissible coaching may affect the adjudication of the case at bar. Attorneys who are notorious for such conduct could have civil verdicts

¹¹⁰ See *United States v. Rhynes*, 196 F.3d 207, 247 (4th Cir. 1999); see also *United States v. Mitola*, 213 Fed. Appx. 579, 579 (9th Cir. 2006) (citing *Geders v. United States*, 425 U.S. 80, 89 (1976)); *United States v. Carrillo*, 16 F.3d 1046, 1050 (9th Cir. 1994).

¹¹¹ See *Geders v. United States*, 425 U.S. 80, 89-90 (1976).

¹¹² See *United States v. Rhynes*, 206 F.3d 349, 369 (4th Cir. 1999); see also *FED. R. EVID.* 615. Under the Rules of Evidence, the court upon motion of the parties must exclude witnesses from a courtroom (with limited exceptions), so that they cannot hear other witness testimony. *Id.* “The purpose of sequestration is to prevent witnesses from tailoring their testimony to that of prior witnesses and to aid in detection of dishonesty.” *United States v. Collins*, 340 F.3d 672, 681 (8th Cir. 2003) (citing *United States v. Vallie*, 284 F.3d 917, 921 (8th Cir. 2002)).

¹¹³ See *United States v. Sepulveda-Hernandez*, 752 F.3d 22, 31 (1st Cir. 2014) (citing *United States v. Collins*, 78 F.3d 1021, 1039 (6th Cir. 1996)); *United States v. Bermea*, 30 F.3d 1539, 1563 (5th Cir. 1994).

¹¹⁴ See *United States v. Casas*, 425 F.3d 23, 47 (1st Cir. 2005).

¹¹⁵ See e.g., *Ibarra v. Baker*, 338 Fed. Appx. 457, 467-68 (5th Cir. 2009).

¹¹⁶ See *Banks v. Thaler*, 583 F.3d 295, 325 (5th Cir. 2009).

¹¹⁷ See *id.* at 325-26.

overturned¹¹⁸ and can be denied *pro hac vice* status.¹¹⁹ Improper coaching of a witness by a prosecutor may result in the declaration of a mistrial with a bar on retrying the defendant,¹²⁰ and coaching in a deposition could lead to dismissal of a complaint with prejudice.¹²¹ Coaching carries disciplinary consequences as well, and may result in an attorney being found in contempt.¹²² Even a mere suspicion of coaching may result in a strong admonition from the court, which may state, for example, “we caution that coaching witnesses to offer false testimony would be a serious violation of professional standards and could amount to criminal conduct.”¹²³

Like the other dangers noted in this article, coaching has a theatrical component to it. A coached witness is like an actor who memorizes their lines so that the production goes as planned, and when an attorney indulges the theatrical nature of the trial, they risk overshadowing the truth. Embedded in prohibitions against coaching is the concern that an overly prepared witness will not speak the unvarnished truth, but simply parrot what the attorney has told them to say in the manner they were told to say it.¹²⁴ By

¹¹⁸ See *Spruill v. Nat'l R.R. Passenger Corp.*, No. 93-4706, 1995 U.S. Dist. WL 534273, at *1 (E.D. Pa. 1995).

¹¹⁹ See *Jacob v. Nat'l R.R. Passenger Corp.*, 63 Fed. Appx. 610, 612 (3d Cir. 2003). *Pro hac vice* refers to a lawyer who has not been admitted to practice in a particular jurisdiction but is admitted temporarily for the purpose of conducting a particular case. *Pro hac vice*, BLACK'S LAW DICTIONARY (9th ed. 2009).

¹²⁰ See *Lovinger v. Cir. Ct. of 19th Jud. Cir.*, 845 F.2d 739, 744 (7th Cir. 1988).

¹²¹ See *Friends of Animals v. United State Surgical Corp.*, 131 F.3d 332, 333 (2d Cir. 1997).

¹²² See *Benson v. American Export Isbrandtsen Lines, Inc.*, 478 F.2d 152, 155 (3d Cir. 1973) (declining to overturn contempt finding after defense counsel ignored trial judge's warnings against coaching witness).

¹²³ See *Victor v. R.C. Bigelow, Inc.*, 708 Fed. Appx. 333, 334 n.2 (9th Cir. 2017).

¹²⁴ See *Perry v. Leeke*, 488 U.S. 272, 283 (1989). The manner in which truth can be compromised by over-preparation between a witness and an attorney is highlighted by the following quote from the Supreme Court:

Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness, including a criminal defendant, to consult without counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with the attorney. 'Once the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination.'

Id. at 282-83 (quoting *United States v. DiLapi*, 651 F.2d 140, 151 (2nd Cir. 1981)).

adhering to ethical rules against coaching and refusing to fuel this theatrical style of trial, the attorney can focus the proceeding on the evidence and the law, in a quest for the discovery of truth.

V. CROSS-EXAMINATION

In the legal classic, *The Art of Cross-Examination*, author Francis Wellman emphasized the importance of cross-examination and its impact on the outcome of a case:¹²⁵ “The issue of a cause rarely depends upon speech and is but seldom even affected by it. But there is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination.”¹²⁶ The United States Supreme Court has similarly recognized cross-examination as, “the greatest engine ever invented for the discovery of the truth.”¹²⁷ Cross-examination has an outsized role in adjudication and is generally idealized (perhaps unfairly) as the most effective means for exposing deception and error.¹²⁸

The act of cross-examination is often an unequal battle of skill between a trained attorney and a potentially inexperienced witness. With cross-examination having such a central role in the litigation process, attorneys may take advantage of this disparate skill level to secure a decisive win for their client. When attorneys succumb to this temptation, cross-examination is not used as a mechanism for sifting out the truth, but rather as a tool for presenting a slanted version of reality in the hopes of benefiting one side.

The ethical and constitutional constraints on cross-examination are divided into three general classes of rules. The first class ensures that cross-examination is based on an appropriate foundation and is not used to put otherwise inadmissible testimony before the jury. The second set of rules focuses on restraining a litigator’s use of cross-examination in a way that invades the province of the jury in determining credibility and ultimate issues of fact.¹²⁹ The third class, specific to criminal law and of significant import

¹²⁵ See FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 21 (4th ed. 1997).

¹²⁶ See *id.*

¹²⁷ See *California v. Green*, 399 U.S. 149, 158 (1970); *Lilly v. Va.*, 527 U.S. 116, 124 (1999); *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

¹²⁸ See *United States v. Leibowitz*, 919 F.2d 482, 484 (7th Cir. 1990). Judge Posner wrote of cross-examination that it might be “the only resource of the defendant in unmasking the falsity” of testimony against him, but that cross-examination, “much mythology to the contrary notwithstanding—is not an infallible lie detector.” *Id.*

¹²⁹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions.”); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 388 (1913) (“[I]t is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence.”)

in the *Rittenhouse* case, prohibits a prosecutor from asking about a defendant's assertion of his right under *Miranda* to remain silent following his arrest.

A. *Cross Without Foundation*

A trial lawyer may not, “allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence[.]”¹³⁰ Rules governing the admissibility of evidence can frustrate a litigator as they may keep information from a jury that would benefit their client.¹³¹ Attorneys are often tempted to circumvent these evidentiary hurdles through cross-examination of a witness, and courts must constrain such questioning to ensure that the rules of evidence are not undermined.¹³²

United States v. Cunningham highlights the damage that results when these rules are not sufficiently policed. In that case, a defendant was cross-examined by a prosecutor who referenced government intelligence reports that were never introduced into evidence.¹³³ Through this line of questioning, the government implied that the defendant was involved in drug dealing without producing witnesses with first-hand knowledge of this assertion—witnesses whose testimony could be challenged by the defendant.¹³⁴ The Sixth Circuit noted that the cross-examination of the defendant “was almost entirely based upon hearsay, suspicion, unverified sources and unreliable innuendo.”¹³⁵

¹³⁰ See MODEL RULES r. 3.4(e).

¹³¹ See FED. R. EVID. 403. Rules of evidence for example require that the probative value of evidence be weighed against its prejudicial effect with the intent of excluding evidence which might be relevant if it risks the danger of unfair prejudice or has a likelihood of confusing the trier of fact. *Id.*; *Sprint v. Mendelsohn*, 552 U.S. 379, 384 (2008).

¹³² By way of example, though it occurred in direct examination rather than cross-examination. Several years ago, I saw a defense attorney accomplish this quite skillfully. His client claimed an alibi against the charges by asserting that at the time of the offense he had travelled to a different state. Rather than proceeding with the laborious, expensive, and often unsuccessful task of subpoenaing out-of-state witnesses to back the alibi testimony, the attorney asked his client, “what was the first thing you did when you arrived in New Jersey (the other state)?” The defendant responded he had used an ATM. The attorney asked him if he remembered the precise time he had used the ATM and the defendant responded that he did not. The attorney then refreshed his recollection using an ATM receipt, which is permissible. FED. R. EVID. 612. The judge ultimately credited the alibi, citing to how well corroborated it had been, but it had never actually been corroborated. After all, the receipt itself was not in evidence. However, this litigation “trick,” created the impression for the judge that independent evidence supported the defendant's testimony.

¹³³ See *United States v. Cunningham*, 529 F.2d 884, 885 (6th Cir. 1976).

¹³⁴ See *id.*

¹³⁵ *Id.* at 887.

Similarly, in *United States v. Crawford*, a prosecutor insinuated that a defendant associated with convicted drug users and dealers by asking him if he knew particular individuals.¹³⁶ Here, the court opined that the defendant had not placed his general character in issue and it was therefore inappropriate to throw, “a shroud of suspicion over [him] and his knowledge of the drug traffic.”¹³⁷ The court also noted that cross-examination is improper and unfair when it is intended to do nothing but degrade the other party and prejudice the jury against him.¹³⁸

The Seventh Circuit has outlined other examples of impermissible attempts to shortcut laying appropriate evidentiary foundation.¹³⁹ For instance, the court has stated that it is improper for a lawyer to “ask a question which implies a factual predicate which the examiner knows he cannot support by evidence or for which he has no reason to believe that there is a foundation of truth.”¹⁴⁰ Examples include asking a witness about prior inconsistent statements without being prepared to call the person to whom the inconsistent statement was made¹⁴¹ and asking a witness about prior convictions without having a certified record of conviction in the event of a denial.¹⁴² It should be noted, however, that a lawyer does not always have a universal duty to introduce the factual predicate for a question and the court may rest its analysis on the good-faith of the questioner.¹⁴³

It is also inappropriate for an attorney to introduce wholly inadmissible testimony during cross-examination. In *United States v. Sanchez*, for example, a prosecutor wanted to show that the defendant’s wife, who could not be called to the stand due to marital privilege,¹⁴⁴ had told an investigator facts that contradicted the defendant’s testimony on the stand.¹⁴⁵ The

¹³⁶ See *United States v. Crawford*, 438 F.2d 441, 443-44 (8th Cir. 1971).

¹³⁷ See *id.* at 444-45.

¹³⁸ See *id.* at 445 (quoting *Salerno v. United States*, 61 F.2d 419, 424 (8th Cir. 1932)).

¹³⁹ See *United States v. Harris*, 542 F.2d 1283, 1307 (7th Cir. 1976).

¹⁴⁰ *Id.*

¹⁴¹ See *United States v. Bohle*, 445 F.2d 54, 73-74 (7th Cir. 1971).

¹⁴² See *State v. Williams*, 210 N.W.2d 21, 25-26 (Minn. 1973) (finding prosecutor questioning defendant about prior crimes for which ‘rap sheet’ did not provide factual basis was improper and prejudicial); cf. *Ciravolo v. United States*, 384 F.2d 54, 55 (1st Cir. 1967) (finding prosecutor questioned defendant about prior felony, which in reality was a misdemeanor was prejudicial).

¹⁴³ See *Harris*, 532 F.2d at 1307-08.

¹⁴⁴ See C. MUELLER, L. KIRKPATRICK, & L. RICHTER, EVIDENCE § 5.31 (6th ed. 2018) (noting there are two common forms of marital privilege). The testimonial privilege gives a witness a right to refuse to testify against their spouse in criminal proceedings and, in some states, empowers someone charged with a crime from preventing their spouse from testifying against them. *Id.* The confidences privilege (also called marital communications privilege) allows witnesses to refuse to reveal their own confidential marital communications and to prevent their spouses from doing so. *Id.*

¹⁴⁵ See *United States v. Sanchez*, 176 F.3d 1214, 1221-22 (9th Cir. 1999).

prosecutor attempted to evade spousal privilege by asking the defendant during cross-examination why his wife would have made these statements to investigators and whether she was lying.¹⁴⁶ The opinion noted that “[i]t is improper ‘under the guise of ‘artful cross-examination’ to tell the jury the testimony of otherwise inadmissible evidence.”¹⁴⁷ The court ended with a colorful comment, noting that “‘while prosecutors are not required to describe sinners as saints, they are required to establish the state of sin by admissible evidence unaided by aspersions that rest on inadmissible evidence, hunch or spite.’”¹⁴⁸ By pursuing this line of cross-examination, the prosecutor essentially undermined the protections of spousal privilege.¹⁴⁹

A variation of this problem emerged during the Rittenhouse trial and partially formed the basis for the defense’s request for a mistrial.¹⁵⁰ Prior to the trial, prosecutors sought to introduce evidence of a video taken fifteen days before the shooting on which Rittenhouse commented that he wished he had his rifle to shoot several men he suspected as shoplifters.¹⁵¹ The prosecutors believed that this showed his mindset as “a teenage vigilante, involving himself in things that [did not] concern him.”¹⁵² The judge indicated that he was not inclined to allow this evidence, but suggested he might reassess his opinion at trial.¹⁵³ The probative value of such evidence is arguably substantially outweighed by its prejudicial effect, which the Federal Rules of Evidence preclude.

The prosecutor, rather than raising the issue outside of the presence of the jury, peppered the defendant on cross-examination with questions about whether it was acceptable to use deadly force to protect one’s personal property.¹⁵⁴ When confronted, the prosecutor argued that the judge had left

¹⁴⁶ See *id.* at 1221.

¹⁴⁷ See *id.* at 1222 (quoting *United States v. Hall*, 989 F.2d 711, 716 (4th Cir. 1993)).

¹⁴⁸ See *id.* (quoting *United States v. Schindler*, 614 F.2d 227, 228 (9th Cir. 1980)).

¹⁴⁹ See *id.* One of the specifically problematic questions the prosecutor asked the defendant on the stand was “Now, you know your wife can’t be made to testify against you, don’t you?” *Id.* at 1221. The court expressed two concerns about this. First, it allowed a question without a demonstration that the defendant’s spouse made such a statement and that it was accurate. *Id.* at 1222. Second, it permitted the jury to draw an adverse inference that because the privilege had been claimed, they could assume had the wife testified it would not be favorable to the defendant. *Id.* The court expressed concern this practice would allow the marital privilege to be undermined by giving the prosecution an unfair advantage. *Id.*

¹⁵⁰ See Todd Richmond & Corey Williams, *Explainer: Prosecutor’s Questions to Rittenhouse Anger Judge*, ABC NEWS (Nov. 10, 2021, 9:10 PM), <https://abcnews.go.com/US/wireStory/prosecutors-questions-rittenhouse-draw-judges-anger-81096096>.

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.*

the door open to this line of questioning in his earlier ruling, to which the judge responded, “For me! Not for you!”¹⁵⁵ The judge’s anger here is not surprising, as the prosecutor clearly referenced evidence that the judge had previously excluded.

B. Invading the Province of the Jury

Over the years, I have seen attorneys ask one witness if they believe another witness is lying after conflicting testimony. While it is appropriate to explore whether one witness has motive to fabricate testimony,¹⁵⁶ it is not appropriate to ask a witness during cross-examination to comment on the truthfulness of another witness.¹⁵⁷ Allowing the witness to do so invades the province the jury in determining the credibility of witnesses.¹⁵⁸ There is a clear difference between establishing that one witness has different testimony from another and asking a witness if another witness is “[l]ying, making up or inventing” testimony.¹⁵⁹ The latter moves beyond highlighting a difference in testimony and instead puts the witness in the position of the jury in determining whether another witness has engaged in deliberate or intentional falsehoods.¹⁶⁰

When witnesses comment on each other’s credibility, it facilitates improperly reductionist arguments at trial.¹⁶¹ For example, when a prosecutor asks a defendant whether an investigative officer is lying and the defendant answers in the affirmative, the prosecutor can then suggest that, if the

¹⁵⁵ Richmond, *supra* note 150.

¹⁵⁶ See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 466 (3d ed. 2012) (alleging that a witness has a motive to fabricate falls within the realm of impeachment of a witness by establishing bias). “Bias is a catchall term describing attitudes, feelings or emotions of a witness that might affect her testimony, leading her to be more or less favorable to the position of a party for reasons other than the merits.” *Id.*

¹⁵⁷ See *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1190-91 (9th Cir. 2015) (first citing *United States v. Harrison*, 585 F.3d 1155, 1158 (9th Cir. 2009); then citing *United States v. Combs*, 379 F.3d 564, 572 (9th Cir. 2004); and then citing *United States v. Sanchez*, 176 F.3d 1214, 1219-20 (9th Cir. 1999)).

¹⁵⁸ See *Alcantara-Castillo*, 788 F.3d at 1191.

¹⁵⁹ See *id.* at 1193.

¹⁶⁰ See *id.* It is also worth noting that this principle echoes the evidentiary rule that witnesses cannot speculate through their testimony and must have personal knowledge of facts in order to testify about them. See FED. R. EVID. 602.

¹⁶¹ See Austin Cline, *Oversimplification and Exaggeration Fallacies*, THOUGHTCO. (May 29, 2021), <https://www.thoughtco.com/oversimplification-and-exaggeration-fallacies-3968441>. Oversimplification and exaggeration occur when actual causes of an event are reduced or multiplied to the point where connections between causes and effects are blurred or buried. *Id.* In other words, multiple causes are reduced to just one or a few (oversimplification), or a couple of causes are multiplied into many (exaggeration). *Id.* Also known as the ‘reductive fallacy,’ oversimplification is common.” *Id.*

officer is telling the truth, then the defendant must be lying and his guilt has been established.¹⁶² This kind of argument can mislead the jury or misstate the evidence by pitting the defendant against the law enforcement officer.¹⁶³ The fundamental question of a criminal trial is whether the defendant committed a crime, and it is “patently misleading to argue that the resolution of this issue hinges upon the veracity of the [law enforcement witnesses.]”¹⁶⁴ The problems created by this line of questioning highlight the overall risk discussed in this article—moving a trial away from an analysis of the actual evidence and focusing instead on theatrics and emotion. When a prosecutor argues that acquitting the defendant is tantamount to a finding that the officer lied under oath, they make a wholly impermissible argument. In that case, a jury could disregard the principle of reasonable doubt because they do not want to call an officer a liar.

Cross-examination can also invade the province of the jury by assuming the ultimate conclusion of the case. For example, if a character witness offers testimony that a criminal defendant charged with drug dealing has a reputation for being honest and truthful, it is impermissible to ask that witness if their opinion would change if they knew the defendant was distributing drugs.¹⁶⁵ This is because an opinion of a witness that is elicited by a question that assumes the central and ultimate issue of the case has limited probative value.¹⁶⁶

One of the more controversial pretrial rulings in the Rittenhouse case was an order by the judge requiring that the individuals who were shot be identified through terms such as “complaining witness” or “decedent” rather than “victims.”¹⁶⁷ The justification for this ruling is rooted in what was discussed earlier in this article—the use of the term “victim” presupposes a legal conclusion, namely that the person was victimized by criminal action. After all, the word “victim” is defined as, “a person harmed by a crime, tort, or other wrong.”¹⁶⁸ This kind of pretrial motion is often common in cases where the contested issue is whether the defendant’s conduct rises to a crime

¹⁶² See *United States v. Richter*, 826 F.2d 206, 209-10 (2d Cir. 1987) (finding prosecutor improperly suggested the resolution of the case hinged on the veracity of FBI agents rather than whether the defendant was guilty of the offenses charged).

¹⁶³ See *id.* at 209.

¹⁶⁴ *Id.*

¹⁶⁵ See *United States v. Mason*, 993 F.2d 406, 407-08 (4th Cir. 1993) (condemning use of “guilt-assuming hypothetical questions asked of law character witnesses”).

¹⁶⁶ See *id.* at 409.

¹⁶⁷ See Becky Sullivan, *Prosecutors Cannot Call Those Shot by Kyle Rittenhouse ‘victims.’ But ‘Looters’ is OK*, NPR (Oct. 26, 2021, 7:02 PM), <https://www.npr.org/2021/10/26/1049458617/kyle-rittenhouse-victims-arsonists-looters-judge-ruled>.

¹⁶⁸ See *Victim*, BLACK’S LAW DICTIONARY (9th ed. 2009).

(as opposed to a trial where everyone agrees a crime has occurred and is instead focused on the identity of the perpetrator). The motion usually prohibits law enforcement witnesses from referring to an individual as a victim, though it should be noted that a prosecutor is often permitted to use the term in closing arguments because, at closing, they assert that the crime has been committed.

As illustrated throughout this section, allowing an officer to call someone a victim is tantamount to that witness concluding that a crime occurred, which is within the province of the jury. Moreover, the term is considered highly prejudicial when the defendant raises a defense of self-defense.¹⁶⁹ When someone is referred to as a “victim,” it is implied that the person was wronged by someone else. Allowing witnesses to plant that image in the minds of a jury encourages the conclusion that the defendant wronged that person. In a self-defense case, that subtle messaging unfairly undermines the defense while bolstering the prosecution’s theory of the case.

The judge’s decision to bar the use of the word “victim” drew widespread coverage and outrage.¹⁷⁰ It is possible that some of this outrage came from a perception that the ruling was slanted, as defense attorneys were permitted to call the men who were shot “looters” and “rioters” if there was evidence to establish that they had engaged in that activity that night.¹⁷¹ While this appears to create a double standard, it should be noted that calling an individual a “victim” presupposes the occurrence of a crime, which only the jury is entitled to conclude. On the other hand, calling an individual a “looter” or “rioter” does not relate to the ultimate issue that must be determined by the jury.

C. Comments on a Defendant’s Right to Remain Silent

The foundation for the Court’s landmark *Miranda* decision was established years earlier in *Escobedo v. Illinois*.¹⁷² This case addressed a criminal defendant’s rights to remain silent and to the assistance of counsel during a custodial interrogation following an arrest.¹⁷³ In its decision, the Court expressly noted its skepticism regarding law enforcement’s reliance on confessions and its ability to undermine these constitutional protections:

¹⁶⁹ See Julie Bosman & Dan Hinkel, *Before Kyle Rittenhouse’s Murder Trial, a Debate Over Terms Like ‘Victim’*, NY TIMES (Nov. 19, 2021), <https://www.nytimes.com/2021/10/27/us/kyle-rittenhouse-trial-victims.html>.

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² See *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁷³ See *id.* at 490-91.

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.¹⁷⁴

Two years later, these principles were bolstered in *Miranda v. Arizona*, where the Court addressed the problem of "official overbearing." Official overbearing occurs when law enforcement takes advantage of a suspect to get the individual to confess to a crime. Such conduct "undermines a defendant's constitutional rights by compelling him "to be a witness against himself."¹⁷⁵ To combat these concerns, the Court held that the prosecution cannot use statements made by a suspect during a custodial interrogation unless it demonstrates the use of "procedural safeguards effective to secure the privilege against self-incrimination."¹⁷⁶ This ruling gave rise to the now-famous *Miranda* warning, which advises a suspect in police custody of the right to remain silent, that any statement made can be used against the suspect, that they have a right to the presence of an attorney during questioning, and that if they can't afford an attorney, one will be appointed for them.¹⁷⁷

Following *Miranda*, a circuit split developed regarding whether a prosecutor could cross-examine a defendant about his choice to remain silent during a police interrogation.¹⁷⁸ The Court first addressed this split in *United States v. Hale*, ruling that the probative value of pretrial, custodial silence following a *Miranda* warning is outweighed by its prejudicial effect.¹⁷⁹ While the Court acknowledged that persistent silence in the face of an accusation of wrongdoing has some probative value, it noted that a suspect's decision to remain silent during the emotional and confusing circumstances following an arrest could be informed by many reasons. Where a person has been advised of their right to remain silent, their doing so may be indicative of a decision to rely on such a right and would "support an inference that the explanatory testimony was a later fabrication."¹⁸⁰

The Court expanded on these principles one year later in *Doyle v. Ohio*.¹⁸¹ Here, the Court acknowledged that silence at the time of arrest may

¹⁷⁴ *Id.* at 488-89.

¹⁷⁵ *See* *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).

¹⁷⁶ *Id.* at 444.

¹⁷⁷ *See id.*

¹⁷⁸ *See* *United States v. Hale*, 422 U.S. 171, 173 (1975).

¹⁷⁹ *See id.*

¹⁸⁰ *See id.* at 176-77.

¹⁸¹ *See* *Doyle v. Ohio*, 426 U.S. 610, 616 (1976).

suggest that the suspect's story was fabricated to "fit within the seams of the State's case as it was developed at pretrial hearings."¹⁸² The Court concluded that because the state was now required to provide advisement of the right to remain silent, every post-arrest silence is "insolubly ambiguous[.]"¹⁸³ And while the *Miranda* warning does not contain an express assurance that silence will be used against the suspect, the assurance is implicit in the warning such that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."¹⁸⁴

Notably, the Court refused to extend this protection to pre-arrest silence in *Jenkins v. Anderson*.¹⁸⁵ In *Jenkins*, the defendant claimed self-defense after killing someone during a knife fight and fleeing the scene of the crime without informing police of what happened.¹⁸⁶ The prosecution in closing argument noted that the defendant had waited at least two weeks before reporting the stabbing to anyone.¹⁸⁷ The defendant later appealed his conviction, arguing that his prearrest silence could not be used against him as it violated his Fifth Amendment rights.¹⁸⁸ In its opinion, the Court looked to the evidentiary rationale that a witness could be impeached by their failure to state a fact in circumstances where it would naturally have been asserted.¹⁸⁹ The Court distinguished this prearrest silence from that which was at issue in *Doyle v. Ohio*, where defendant had been advised of his right to remain silent by law enforcement.¹⁹⁰ Here, the Court noted that because no government actor had taken action that might have induced the defendant's decision to remain silent, there was no constitutional violation embedded in the state making evidentiary use of that silence.¹⁹¹

This position was strengthened two years later in *Fletcher v. Weir*, when the Court affirmed that the provisions of the *Miranda* warning, rather than the arrest itself, activates the prohibition on the prosecution commenting on the defendant's silence.¹⁹² Therefore, if police arrest a defendant but fail to give *Miranda* warnings, and the person subsequently testifies at trial, the prosecution can legitimately cross-examine them on their decision to

¹⁸² *Id.*

¹⁸³ *See id.* at 617.

¹⁸⁴ *See id.* at 618.

¹⁸⁵ *See Jenkins v. Anderson*, 447 U.S. 231, 238-39 (1980).

¹⁸⁶ *See id.* at 233.

¹⁸⁷ *See id.* at 234.

¹⁸⁸ *See id.* at 232.

¹⁸⁹ *See id.* at 239.

¹⁹⁰ *See Doyle*, 426 U.S. 610 (1976).

¹⁹¹ *See id.* at 240.

¹⁹² *See Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982).

withhold their version of the incident from police when arrested. It is important to note that while *Miranda* prevents the prosecution from using a defendant's unwarned incriminating statements in its case in chief, the government may use statements made by a defendant in violation of *Miranda* during cross-examination.¹⁹³

This line of cases could create a bizarre incentive structure for law enforcement officers tasked with giving suspects *Miranda* warnings prior to eliciting confessions. *Escobedo* highlighted that society should not value a criminal justice system that emphasizes confessions over independent investigation, and this is part of why the right to remain silent is an important right.¹⁹⁴ *Miranda* offered protection of this right by requiring that whenever law enforcement questions a suspect in custody, they must provide certain procedural warnings of the suspect's rights. Under *Hale* and *Doyle*, the prosecution loses the ability to question the suspect at trial about the decision to remain silent after he has been properly *Mirandized*.

From a game-theory perspective,¹⁹⁵ a law enforcement officer is incentivized to make an educated guess about whether a given suspect is likely to answer questions once read their rights. If the suspect is likely to do so, then the warning should be given, so the statements are admissible. But, if the suspect is likely to say something about the crime without making inculpatory admissions, the police have an incentive under *Fletcher v. Weir* to not *Mirandize* the defendant before questioning him. The defendant is then in a trap where either the decision to answer the question or the decision to remain silent can be used against him. If he answers the un-*Mirandized* questions and subsequently testifies, the prosecution may cross-examine and impeach him on any inconsistencies. If he remains silent, on the other hand, the prosecution may impeach him using the fact that he told the story for the first time at trial.

In the Rittenhouse case, an allegation that the prosecutor commented on the defendant's invocation of his right to remain silent following his arrest formed the basis of the defendant's request for a mistrial.¹⁹⁶ In its cross-examination of Rittenhouse, the prosecution attempted to show the defendant was entirely honest on the stand and had tailored his testimony over the

¹⁹³ See *Harris v. New York*, 401 U.S. 222, 224-26 (1971).

¹⁹⁴ *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964).

¹⁹⁵ "Game theory is a set of tools and a language for describing and predicting strategic behavior." Randal C. Picker, "An Introduction to Game Theory and the Law" (Coase-Sandor Institute for Law & Economics Working Paper No. 22, 1994). Game theory posits that rational actors need to worry about the actions of others and utilizes that interdependence to make strategic choices. *Id.*

¹⁹⁶ See Amy Forliti & Scott Bauer, *EXPLAINER: What's Behind Rittenhouse Mistrial Requests?*, AP NEWS (Nov. 19, 2021), <https://apnews.com/article/kyle-rittenhouse-trial-judge-directed-verdict-788879e4deb6d4639adab573ee3ff753>.

course of the last year.¹⁹⁷ The defense objected, arguing that this line of questioning amounted to a comment on the defendant's right to remain silent.¹⁹⁸ The judge warned the prosecutor that he was "right on the borderline" and that it would be, "a grave constitutional violation for [him] to talk about a defendant's silence[.]"¹⁹⁹ Despite this warning, the judge again had to admonish the prosecutor for engaging in a similar line of questioning.²⁰⁰ The judge's anger towards the prosecution highlights how serious this issue is. Because judges do not want to punish a defendant for exercising their right to remain silent, prosecutors should simply avoid mentioning any conduct that draws the jury's attention to the fact that a particular defendant did not speak to law enforcement after being arrested.

VI. CLOSING

Closing arguments represent the final opportunity for each side to address the jury before it renders judgment on the case. Since it is critical to take advantage of this opportunity to persuade the jury, it becomes tempting to blur the ethical lines through an improperly theatrical closing. This section will return to an examination of improper rhetoric—including the use of religious, moral, or other inflammatory language. This section will also address limitations on attacking the other side of the case—both counsel and their witnesses—when an attorney attempts to persuade the jury that it should side with their legal argument.

A. *Use of Religious, Moral, and Other Inflammatory Rhetoric*

It is hard to imagine a party winning a trial without making a closing argument. A persuasive closing argument may help a litigator recover when previous phases of the trial have gone poorly. Closing arguments are also critical because empirical studies show they are easier for juries to remember than trial testimony.²⁰¹

An effective closing argument must be persuasive. Aristotle argued that there were three primary methods of persuasion—ethos (an ethical

¹⁹⁷ See Libby Emmons, *BREAKING: Judge Slams Prosecutors For Trying to Use Rittenhouse's Right to Remain Silent Against Him*, POST MILLENNIAL (Nov. 10, 2021), <https://the-postmillennial.com/judge-slams-prosecutors-for-trying-to-use-rittenhouses-right-to-remain-silent-against-him>.

¹⁹⁸ See *id.*

¹⁹⁹ *Id.*

²⁰⁰ See *id.*

²⁰¹ See FREDERIC G. LEVIN, MIKE PAPANTONIO, & MARTIN LEVIN, *CLOSING ARGUMENTS: THE LAST BATTLE* 4 (1st ed. 2003).

appeal or appeal based on credibility), *logos* (a logical argument), and *pathos* (an emotional argument).²⁰² Many of the legal rules which have been discussed in this article could be viewed as favoring *logos*, as they emphasize that courtroom decisions must be made on the basis of the evidence educed at trial.²⁰³ “It is the hallmark of a fair and civilized justice system that verdicts be based on reason, not emotion, revenge, or even sympathy.”²⁰⁴ But, as Aristotle noted, the power of emotion as a tool of persuasion primes this as an area of potential conflict. The attorney who hopes to prevail is often tempted to produce a theatrical display aimed at triggering an emotional response in the jury, which may overshadow the evidence and governing law.

If we value the idea that verdicts are based on evidence rather than emotion, lines must be drawn regarding the language used to distinguish between rhetorical flourish and impermissible emotional appeals. For instance, religious and moral rhetoric specifically appeal to passion and prejudice rather than reason and the law.²⁰⁵ Concern about the use of religious imagery in arguments is reflected in *United States v. Giry*, where the First Circuit considered whether statements made by the prosecutor prejudicially inflamed the jury.²⁰⁶ The prosecutor’s “most egregious comment” was that the defendant’s denial of the specific intent to import cocaine, “[s]ounds like Peter who for the third time denied Christ[.]”²⁰⁷ The court ruled that this constituted an irrelevant and inflammatory appeal to the jurors’ private religious beliefs and “[s]uch comments warrant special condemnation when uttered by the government’s attorney, whose duty is as much ‘to refrain from improper methods calculated to produce a conviction as it is to use every legitimate means to bring about a just one.’”²⁰⁸ While ultimately finding the trial judge gave a sufficiently strong curative instruction to solve the problem, the court called this statement “deliberate,” “wholly unprovoked,” and

²⁰² See Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 WASH. U. JURIS. REV. 131, 132 (2014).

²⁰³ See *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (noting evidence can be relevant, but still be inadmissible because it has the tendency to “lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged[,]” including an emotional basis).

²⁰⁴ *Le v. Mullin*, 311 F.3d 1002, 1015 (10th Cir. 2002).

²⁰⁵ See *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991) (identifying as outrageous comments by a prosecutor which included, “numerous appeals to religious symbols and beliefs, at one point even drawing an analogy to Judas Iscariot.”)

²⁰⁶ See *United States v. Giry*, 818 F.2d 120, 132-34 (1st Cir. 1987).

²⁰⁷ See *Giry*, 818 F.2d at 132. The Bible relays different accounts of Peter, a disciple of Christ, denying knowing him on three different occasions when questioned by authorities, following Christ’s arrest. *Matthew* 26:33-35, *Mark* 14:29-31, *Luke* 22:33-34, and *John* 18:15-27.

²⁰⁸ See *Giry*, 818 F.2d at 133 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

of such “complete irrelevance” that “its sole purpose was to inflame the jury’s passions.”²⁰⁹

It should be noted that, similar to prohibitions on religious appeals, the Supreme Court has found it improper to use language that dehumanizes the other side.²¹⁰ There is an additional prohibition on imposing certain moral imperatives on a jury in criminal cases. While it is not *per se* improper for a prosecutor to ask the jury to act as the conscience of the community, it becomes improper to ask the jury to convict the defendant in order “to protect community values, preserve civil order, or deter future lawbreaking.”²¹¹

In the civil context, wrongful death cases are easy targets for an overly emotional closing argument by the plaintiff’s attorney.²¹² In *Draper v. Airco, Inc.*, the Third Circuit found that while the family of the victim was “entitled to have someone speak with eloquence and compassion for their cause[,]” a plea of pure passion must be restrained to preclude a blatant appeal to bias and prejudice.²¹³ The court specifically noted that the ethics rules and constraints from case law protect against this danger.²¹⁴ Plaintiff’s counsel in *Draper* committed many of the errors which have been discussed in this article, including asserting his own personal opinion as to the justness of a client’s cause, referring to facts not in evidence, and, as will be discussed, making “several prejudicial, vituperative and insulting references to opposing counsel.”²¹⁵ The court ultimately cited the attorney’s inflammatory and prejudicial rhetoric as the basis for overturning the judgement in his client’s favor.²¹⁶ In remanding the matter for a new trial, the court reasoned that the closing argument of the plaintiff “was so constantly and effectively addressed to the prejudices of the jury” that a new trial was necessary.²¹⁷

B. *Attacking the Other Side*

When witnesses offer conflicting testimony, an attorney must convince the jury that they should credit the testimony of the witnesses who

²⁰⁹ See *id.* at 134.

²¹⁰ See *Darden v. Wainwright*, 477 U.S. 168, 180 (1986) (condemning a closing argument where the prosecutor used the word “animal” and made, “several comments reflecting an emotional reaction to the case.”)

²¹¹ See *United States v. Solivan*, 937 F.2d 1146, 1151, 1153 (6th Cir. 1991) (quoting *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984)); see also *Henderson v. United States*, 218 F.2d 14, 19-20 (6th Cir. 1955).

²¹² See *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3d Cir. 1978).

²¹³ See *id.* at 95.

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See *Draper*, 580 F.2d at 96-97.

support their side and disregard the testimony of opposing witnesses. Attorneys are given reasonable latitude in fashioning closing arguments, including making reasonable inferences based on the evidence.²¹⁸ Where a case “essentially reduces to which of two conflicting stories is true, it may be reasonable to infer, and hence to argue, that one of the two sides is lying.”²¹⁹ However, as a general rule, evidence of personal character or a character trait is not admissible to prove that on a particular occasion the witness acted in accordance with that character.²²⁰ While there are specific means of impeaching a witness such as offering evidence of their reputation for truthfulness,²²¹ bias,²²² or relevant prior convictions,²²³ an attorney does not have the right to make a general attack on a witness’s character.²²⁴

The Rittenhouse case demonstrated the fine line an attorney must observe in cross-examining a witness for perceived bias.²²⁵ Here, the prosecutor sought to impeach Drew Hernandez, a journalist who had recorded video of one of the fatal shootings, by demonstrating bias based on the fact that his employer was a platform for far-right political views.²²⁶ The prosecutor was permitted to show that, minutes after posting the video on Twitter, the witness had tweeted a comment noting that, in his view, the shooting by Rittenhouse was a measure taken by an armed citizen defending a car dealership.²²⁷ This strategy of cross examination demonstrated the witness’s bias in that he appeared to be operating from a perspective that Mr. Rittenhouse was justified in his conduct. The witness’s predisposition for Mr. Rittenhouse’s actions is something the jury would need to know to evaluate the strength of this testimony. However, when the prosecutor attempted to ask about the political orientation of the witness’s employer, the judge refused

²¹⁸ See *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991).

²¹⁹ See *id.*

²²⁰ See FED. R. EVID. 404

²²¹ See FED. R. EVID. 608

²²² See Kirkpatrick, *supra* note 156.

²²³ See FED. R. EVID. 609

²²⁴ See *United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir. 1996) (outlining five acceptable methods of attacking the credibility of a witness’s testimony). The five methods are as follows: 1) attacking their character for truthfulness; 2) demonstrating that prior to trial the witness made statements inconsistent with their testimony; 3) showing the witness is biased; 4) showing a default in capacity to perceive, recall or relate the event about which they are testifying; and 5) contradicting the substance of the witness’s testimony. *Id.* (citing GOLD, 27 FED. PRAC. & PROC. EVID. § 6094 (2d ed.)).

²²⁵ See Robert Mackey, *Rittenhouse Trial Judge Blocks Prosecutor From Asking if Far-Right Videographer is Biased*, THE INTERCEPT (Nov. 11, 2021), <https://theintercept.com/2021/11/11/rittenhouse-trial-judge-blocks-prosecutor-asking-far-right-videographer-biased/>.

²²⁶ See *id.*

²²⁷ See *id.*

to allow it saying “this is not a political trial.”²²⁸ The judge’s refusal demonstrates the distinction between cross-examining a witness for bias and attempting to bring out a fact about the witness, such as their political affiliation, that may taint how certain jurors view them.

When litigating a case, it is also critical that attorneys maintain their professionalism. The Preamble to the Rules of Professional Conduct notes that “[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.”²²⁹ This value of professionalism, embedded in ethical rules, is also reinforced by case law. The prohibition on personal attacks “is but a part of the larger duty of counsel to avoid acrimony in relations with opposing counsel during trial and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel.”²³⁰

An overly theatrical approach to litigation emerges when lawyers turn the focus to themselves and make derogatory comments about each other. For example, in *United States v. Young*,²³¹ the defense attorney in closing argued that his client had been unfairly prosecuted; that throughout the trial, the prosecutor had poisoned the jurors’ minds against his client unfairly; that the prosecutor had behaved reprehensibly; and no one in the courtroom, including the prosecutor, believed that his client intended to defraud anyone.²³² The appeal focused on the prosecutor’s comment regarding his own belief in the defendant’s guilt during his rebuttal closing.²³³ While acknowledging this point, the Court noted it is incumbent on all attorneys to confine their arguments within proper bounds and that the defense attorney was also prohibited from interjecting his personal beliefs into the presentation.²³⁴ The Court took particular issue with the defense attorney’s “unfounded and inflammatory attacks” on the opposing side, writing, “[t]he kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded[.]”²³⁵ The Court recognized a trial doesn’t always follow a script and, occasionally, in the heat of the moment problematic remarks are made.²³⁶ This case nevertheless highlights the

²²⁸ *See id.*

²²⁹ *See* MODEL RULES OF PRO. CONDUCT pmb1. (AM. BAR ASS’N 1983)

²³⁰ *United States v. Young*, 470 U.S. 1, 9 (1985) (internal citations omitted).

²³¹ 470 U.S. 1 (1985)

²³² *See id.* at 4.

²³³ *See id.* at 6.

²³⁴ *See Young*, 470 U.S. at 8 (citing *Sacher v. United States*, 343 U.S. 1, 8 (1952)).

²³⁵ *See id.* at 9.

²³⁶ *See id.* at 10 (first citing *Geders v. United States*, 425 U.S. 80, 86 (1976); and then citing *Dunlop v. United States*, 165 U.S. 486, 498 (1897)).

2022]

Give 'Em the Ol' Razzle Dazzle

239

importance of litigators acting professionally at all time and not making their battle a personal crusade against the integrity or character of opposing counsel.

VII. CONCLUSION

Litigators are naturally competitive people who want their own side to prevail in the courtroom. This may arise out of a mere desire to win or a desire to improve their public perception as attorneys. Many, if not most, attorneys, also believe in the cause they are advancing in the courtroom. Each of these impulses creates a drive to win, and to prevail, an attorney must convince a jury of twelve laypeople that their side is the right one, and that the jury should care enough about the correctness of this position to deliver a verdict for their client. This creates an inherent theatrical setting for trials and, in an effort to win over the jury, the lawyer often becomes the actor who wants to put on the performance of a lifetime. On the other side of this equation is a judicial system that seeks the truth. That quest for truth requires the jury to remain focused on the evidence before it and to make reasoned and logical judgments from that evidence, rather than falling prey to overly emotional appeals, prejudice, and bias.

This article has highlighted the dangers that emerge at each stage of a trial when the proceeding becomes overly theatrical. As has been shown, this typically occurs when the focus of the attorneys and the jury shifts from the evidence itself to the performance and conduct of the attorneys. Guardrails—both ethical and constitutional—exist at each of these phases to prevent such theatrics; but these safeguards are only effective to the extent they are known, respected, and strictly enforced by the court. A trial attorney's performance will naturally contain theatrical elements due to the inherent role that emotion plays in persuasion. But understanding the limits of emotive advocacy allows an attorney to maintain their ability to persuade others, while upholding the integrity of a system that aims to discover the truth.