Professional Responsibility on the Edge

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If you're not living on the edge then you're taking up too much room.[1]

Professional responsibility on the edge? It may strike you that approaching professional responsibility by studying the edge or boundaries of the rules is a problem in itself. It just seems right that in trial work in general and professional responsibility practice in particular a practitioner should be concerned with model conduct far from the edge or limits of what he can get away with. Not so fast—Professional Responsibility does have some straightforward no-no's. Lying,[2] vouching,[3] and violating the rules of court[4] are always proscribed, and it is generally forbidden to serve two masters.[5]

In a greater sense, however, our profession[6] requires trade-offs and compromises between competing values.[7] While counsel may never lie, a defense counsel may be required to use truthful means to paint a false picture.[8] And while we've come a long way since the days where trial by ambush was the norm,[9] there is still an expectation that advocates can and will seize on ambiguities in language or interpretation to put their client in his best light. This article will plunge into the gray waters at the edge of what's permissible in professional responsibility.

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[1] Anonymous, although it is frequently attributed to motorcycle daredevil Evel Knievel or Lieutenant Colonel Nick Lancaster, U.S. Army.

[2] U.S. DEP'T OF THE ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS Rules 3.3, 3.4, 4.1 (1 May 1992) [hereinafter AR 27-26] (proscribing outright lies and the destruction of evidence).

[3] *Id.* R. 3.4; ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-5.8 (3d ed. 1993) (proscribing an attorney who is an advocate in a trial from expressing a personal belief in the truth or falsity of any evidence, witness or in the guilt or innocence of the accused).

[4] AR 27-26, *supra* note 2, R. 3.4 (requiring obedience to the rules of evidence, discovery, and orders of the court).

[5] *Id.* R. 1.7; *see also Matthew* 6:24.

[6] A profession is "[a] vocation or occupation requiring special, usually advanced, education, knowledge, and skill." BLACK'S LAW DICTIONARY (6th ed. 1990). Originally, this term applied only to the fields of theology, law, and medicine but is now also accepted in the fields of science and learning that take more mental and intellectual skill. *Id.*

[7] For instance, an attorney must balance the various duties of loyalty to a single client ("zealous representation") with justice and fair play as public officers and officers of the court.

[8] The Supreme Court opined:

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. . . . To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. . . . He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. . . . Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

United States v. Wade, 388 U.S. 218, 257–58 (1967).

[9] Consider Professor Wigmore's view of discovery sixty eight years ago:

> To require the disclosure to an adversary of the evidence that is to be produced, would be repugnant to all sportsmanlike instincts. Thus the common law permitted a litigant to reserve his evidential resources (tactics, documents, witnesses) until the final moment, marshaling them at the trial before his surprised and dismayed antagonist. Such was the spirit of the common law; and such in part it still is. It did not defend or condone trickery and deception; but it did regard the concealment of one's evidential resources and the preservation of the opponent's defenseless ignorance as a fair and irreproachable accompaniment of the game of litigation.

Harvey v. Horan, 285 F.3d 298, 317 (4th Cir. 2002) (quoting 6 WIGMORE, DISCOVERY § 1845, at 490 (3d ed. 1940)).

Expert Testimony: A Lie Detector by a Different Name?

Too often we . . . enjoy the comfort of opinion without the discomfort of thought.[10]

Assume you are prosecuting a difficult case involving a child victim. You know from opening statements that the defense intends to allege that the child victim's story is fabricated as a result of ideas implanted by forensic interviews. In discussions and preparation for trial your expert witness has told you a number of empirical reasons why he believes the victim is truthful. Is there any way to get that in?

In *United States v. Brooks*,[11] Staff Sergeant (SSG) Stacey S. Brooks was convicted at a general court-martial of two specifications of indecent liberties with a female under the age of sixteen, in violation of Article 134, Uniform Code of Military Justice (UCMJ).[12] The victim was a five-year-old girl who SSG Brooks's wife babysat from time to time.[13] Staff Sergeant Brooks was sentenced to a dishonorable discharge, eighteen months confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.[14] The convening authority reduced his confinement to fourteen months.[15] Staff Sergeant Brooks appealed his case to the United States Air Force Court of Criminal Appeals (AFCCA), which affirmed the findings and sentence as approved by the convening authority.[16]

At issue in the *Brooks* case was the testimony of Dr. Marvin W. Acklin, Jr.[17] Dr. Acklin was qualified as an expert in the field of clinical child psychology by the prosecution.[18] On direct examination Dr. Acklin testified generally about the cognitive abilities of children, specifically their ability to differentiate fact from fiction.[19] Dr. Acklin further testified about suggestibility, the prospect that interaction with a person, not the accused, could have influenced the child's testimony or memory about events.[20] He testified that he found the alleged victim in this case to be a normal little girl who could distinguish truth versus lies.[21]

On cross examination the defense solicited testimony that Dr. Acklin did not re-interview the alleged victim because of his concern about suggestibility.[22] The defense counsel explored with Dr. Acklin how and why children generally might fabricate stories of sexual abuse.[23] Dr. Acklin agreed that multiple interviews of a child, as what occurred in this case, might have the effect of influencing the child's belief and testimony about what happened.[24]

When the trial counsel conducted redirect examination he immediately drew an objection for a question regarding what motives, if any, the child would have to lie in the case.[25] The objection was overruled and Dr. Acklin testified that false allegations sometimes arise because of misinterpretation of the alleged victim's comments by the interviewer.[26] He then suggested that if you take out misinterpretations and allegations made from homes embroiled in divorce litigation the

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[10] Brainyquote.com, President John F. Kennedy, http://www.brainyquote.com/quotes/authors/j/john_f_kennedy.html (last visited Apr. 17, 2008).

[11] 64 M.J. 325, 326 (2007).

[12] UCMJ art. 134 (2008).

[13] *Brooks*, 64 M.J. at 326.

[14] *Id.*

[15] *Id.*

[16] *Id.*; *see also* United States v. Brooks, No. ACM 35420, 2005 CCA LEXIS 277 (A.F. Ct. Crim. App. 2005).

[17] *Brooks*, 64 M.J. at 326.

[18] *Id.* at 327.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id*

[25] *Id.*

[26] *Id.*

incidence of false allegations were very low.[27] He went on to share with the panel that empirical studies in the "business" showed a roughly 2% chance that allegations were fabricated under these circumstances.[28] That exchange did not draw an objection from the defense, nor did the military judge issue a curative instruction sua sponte.[29]

At closing argument the military judge read standard instructions on witness credibility and gave a basic instruction that the panel should not interpret Dr. Acklin's testimony as evidence of any other witness's credibility.[30] The trial counsel argued that he was, among other things, "convinced beyond a reasonable doubt" that the child witness was being truthful.[31] Staff Sergeant Brooks argued on appeal that counsel's argument was improper and that the admission of Dr. Acklin's percentage evidence was impermissible "profile" evidence, whose admission prejudiced his right to a fair trial.[32]

Profile Evidence?

Profile evidence is evidence that characteristics of an accused match those of a standard profile of the perpetrator of a crime in evidence.[33] For instance, a trial counsel might elicit expert testimony from a Drug Enforcement Agency official to the effect that: "Drug dealers are generally tall with a full head of hair. The accused is tall and bushy topped, and therefore you may conclude he deals drugs."[34]

The court established that the prosecution did not elicit profile evidence. Profile evidence compares characteristics of an accused with a "standard perpetrator." In this case the prosecution sought to use statistical evidence to bolster the victim's credibility. In effect the expert testified that "statistically speaking, the victim is telling the truth." Although this was not profile evidence, which is improper in criminal trials,[35] was it otherwise permissible?

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[27] *Id.*

[28] *Id.* The critical exchange in re-direct is as follows:

> [TC]: In your experience, in your professional medical experience, how frequency, how frequently, excuse me, do you see cases of false allegations?
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> [Dr. Acklin]: I believe I testified at the Article 32 Hearing that it's about a five percent level. That's considered to be about, interestingly enough, the level of false allegations one encounters in the business and in research. It ranges anywhere from five to twenty percent, depending on the sample that you look at, but it's generally considered to be, what's called a low base-rate phenomenon, which is . . . not that infrequent.
>
> Once you take away misinterpretation, then it even drops even further, because then we're talking about the pure fabricated sex abuse allegation. And, the general sense of that in the divorce business, where they tend to occur at the greatest frequency, is it's two to five percent.

Id.

[29] *Id.*

[30] *Id.* at 326. The instruction given by the military judge:

> Only you, the members of the court determine the credibility of the witnesses and what the fact[s] of this case are. No expert witness or other witness can testify that the alleged victim's account of what occurred is true or credible, that the expert believes the alleged victim, or that a sexual encounter occurred. To the extent that you believed that Dr. Acklin testified or implied that he believes the alleged victim, that a crime occurred, or that the alleged victim is credible, you may not consider this as evidence that a crime occurred or that the alleged victim is credible.

Id. at 327.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 329 (quoting United States v. Bresnahan, 62 M.J. 137 (2005)).

> Profile evidence is defined as "evidence that presents a 'characteristic profile' of an offender, such as a pedophile or child abuser, and then places the accused's personal characteristics within that profile as proof of guilt." Generally, the use of any "profile" characteristic as evidence of guilt or innocence is improper at a criminal trial.

Id.

[34] Author's note: The author's height exceeds the national average height of adult males in the United States and is not currently bald or balding. The author does not wish to imply that tallness or hairy-headedness is in any way indicative of criminal activity.

[35] *Brooks*, 64 M.J. at 329.

Military Rule of Evidence 608 governs the limits of what can be done to bolster or attack credibility of a witness.[36] A witness's credibility may be bolstered by testimony by someone with an adequate foundation to give an opinion as to the witness's truthfulness or reputation for the same in their community.[37] The CAAF has repeatedly rejected the premise that a lay or expert witness could give an opinion as to the credibility of a witness with respect to a specific fact in issue in the case.[38]

The court articulated three reasons why so called "human lie-detector" testimony is inadmissible.

> "First, determination of truthfulness 'exceeds the scope of a witness' expertise, for the expert lacks specialized knowledge . . . to determine if a child-sexual-abuse victim [is] telling the truth'" and therefore cannot "assist the trier of fact" as required under Military Rule of Evidence (M.R.E.) 702 before expert testimony is permissible. Second, such testimony violates the limitations of M.R.E. 608. Third, human lie detector testimony encroaches into the exclusive province of the court members to determine the credibility of witnesses.[39]

Clearly, human lie detector testimony is impermissible. That is to say, Dr. Acklin could not have taken the stand and said, "In my expert opinion, the little girl's allegations are true." Yet, he did not do that, he simply shared studies known within the scientific community about credibility rates of alleged victims. To answer whether that was permissible they looked at the three reasons for prohibiting lie detector testimony listed above and they looked outside the military.[40] The Delaware Supreme Court found that an expert's statement that "ninety-nine percent of the alleged victims involved in sexual abuse treatment programs in which she was also involved 'have told the truth,'"[41] was an example of plain error. The court made this finding even though the defense elicited the statement during defense voir dire of the expert.[42]

In the Delaware court's view this "percentage" testimony exceeded the permissible bounds of expert testimony permitted in child sexual abuse prosecutions.[43] A previous Court of Appeals for the Armed Forces (CAAF) case found that an expert may "inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits,"[44] but that an expert may not give numerical testimony that is the functional equivalent of saying that the victim in a given case is truthful or should be believed.[45]

The CAAF found that Dr. Acklin was quantifying the chance of the alleged child victim's testimony being false as less than 2%.[46] To admit expert testimony that the odds that a victim's version of events is correct are forty-nine out of fifty impermissibly invaded the province of the fact finder. The CAAF therefore reversed the Air Force court and remanded the case for rehearing.[47]

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[36] MANUAL FOR COURTS MARTIAL, UNITED STATES, MIL. R. EVID. 608 (2008) [hereinafter MCM].

[37] *Id.*

[38] *Brooks*, 64 M.J. at 328; *see also* United States v. Kasper, 58 M.J. 314, 315 (2003) ("[A]n expert on the subject of child abuse is not permitted to testify that the alleged victim is or is not telling the truth as to whether the abuse occurred."); United States v. Birdsall, 47 M.J. 404, 410 (1998) ("[T]he expert in child abuse may not act as a human lie detector for the court-martial."); United States v. Cacy, 43 M.J. 214, 218 (1995) ("We do not allow an expert to opine that a victim is telling the truth . . . ."); United States v. Harrison, 31 M.J. 330, 332 (C.M.A. 1990) ("It is impermissible for an expert to testify about his or her belief that a child is telling the truth regarding an alleged incident of sexual abuse."); United States v. Arruza, 26 M.J. 234, 237 (C.M.A. 1988) ("[C]hild-abuse experts are not permitted to opine as to the credibility or believability of victims or other witnesses."); United States v. Petersen, 24 M.J. 283, 284 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another.").

[39] *Brooks*, 64 M.J. at 328 (citations omitted).

[40] *Id.*

[41] Powell v. State, 527 A.2d 276, 278 (Del. 1987).

[42] *Id.*

[43] *Id.*

[44] United States v. Birdsall, 47 M.J. 404, 409 (1998) (quoting United States v. Whitted, 11 F.3d 782, 785 (8th Cir. 1993)).

[45] *Id.*

[46] United States v. Brooks, 64 M.J. 325, 330 (2007).

[47] *Id.* at 330.

What can you do? The court allows in a sense "reverse profile evidence." It is proper to have a witness testify that victims of child sexual abuse exhibit given symptoms.[48] An expert may describe the patterns of grooming that pedophiles adopt to condition their victims for abuse.[49] You may be wondering what this has to do with professional responsibility. Improper argument, and failure by the defense to object to improper argument, may constitute prosecutorial misconduct and ineffective assistance of counsel.[50] Changes in presentation regarding similar information may change useful expert testimony into reversible plain error. It pays to know where the edge of permissible expert pattern testimony is.

Justice Past Due Meets Justice over Done

Let us imagine that you are a defense counsel who is frustrated that Military Rules of Evidence (MRE) 404(b), 413, and 414 permit the introduction of significant uncharged misconduct in your client's trial.[51] You are concerned, not only about undue prejudice of such misconduct on a panel's findings, but also its impact on sentencing.[52]

The prosecutor, on the other hand, used those rules to gleefully admit fifteen year old allegations of uncharged misconduct. The prosecutor rises to address the panel for her closing argument. Her paralegal NCO dims the lights as her co-counsel turns on a PowerPoint slide show. You see the first slide has photos of the alleged victim and the alleged victim from the uncharged misconduct under the heading "Stolen Innocence: Justice Past Due."[53] As your co-counsel rolls his eyes, a voice deep within you stirs. Is this objectionable? Is it ethical?

It is well-settled in American jurisprudence that the criminally accused should be convicted and sentenced based on competent evidence of their guilt of the offenses charged and not on evidence of a general criminal propensity or other

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[48] *Id.* at 328.

[49] *Id.* (quoting United States v. Harrison, 31 M.J. 330, 332 (C.M.A. 1990)).

> An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms. He or she may also "discuss 'various patterns of consistency in the stories of child sexual abuse victims and compar[e] those patterns with patterns in . . . [the victim's] story.'"

Id.

[50] *See, e.g.*, United States v. Edmond, 63 M.J. 343 (2006).

[51] The MRE provides, in part, that:

> Military Rule of Evidence 404
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> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
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> Military Rule of Evidence 413, Evidence of Similar Crimes in Sexual Assault Cases
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> (a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
>
> Military Rule of Evidence 414, *Evidence of Similar crimes in child molestation cases*
>
> (a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

MCM, *supra* note 36, MIL. R. EVID. 404(b), MIL. R. EVID. 413(a), MIL. R. EVID. 414(a).

[52] Federal Rules of Evidence 413 and 414 are substantially similar to the MRE 413 and 414. The Judicial Conference of the United States noted in response to the proposed federal rules:

> The new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person

United States v. Schroder, 65 M.J. 49, 55 (2007) (quoting JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995)).

[53] *See, e.g., id.* at 52.

evidence of bad character.[54] Military Rules of Evidence 413 and 414 present a thorny problem for trial practitioners trying to determine the ethical use of uncharged misconduct. Military Rule of Evidence 414(a) clearly provides that evidence of uncharged misconduct may be considered for "any matter to which it is relevant."[55] In contrast, as noted above, use of propensity evidence presents a risk that an accused may be convicted and sentenced based on uncharged conduct and not the acts for which he is on trial.[56]

The CAAF confronted this issue last year in *United States v. Schroder*.[57] In *Schroder*, a prosecutor duly admitted evidence that Chief Master Sergeant Schroder had molested his stepdaughter in 1981 and used uncharged incidents of molestation with Schroder's other daughter to support the charged offenses of raping his daughter and sexually molesting a twelve-year-old neighbor over a decade later.[58]

The panel was instructed that they could consider similarities in the charged and uncharged misconduct in determining whether the accused was guilty.[59] The court found the instruction insufficient on the grounds that the military judge did not sufficiently clarify that the introduction of propensity evidence did not relieve the prosecution of its burden to prove every element of every offense beyond a reasonable doubt.[60]

The court then turned to the issue of argument. The prosecution team in their closing argument on the merits, rebuttal argument on the merits, and the pre-sentencing argument featured a slide show depicting the three alleged victims under the heading "Stolen Innocence: Justice Past Due."[61] The trial counsel made a direct appeal at the end of his rebuttal argument, exhorting the panel to "not forget about the victims"[62] and went on to list three, while only two were victims of charged

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[54] The government has a constitutional burden to prove every element of every charged offense beyond a reasonable doubt without reliance on propensity evidence. *Id.* at 55.

[55] MCM, *supra* note 36, MIL. R. EVID. 414(a).

[56] *Schroder*, 65 M.J. at 56.

[57] *Id.* at 49.

[58] *Id.* at 51–52.

[59] The extent of the military judge's instructions regarding the use of SJS's and JPR's testimony admitted under MRE 414, the proper use of the uncharged misconduct evidence:

> Each offense must stand on its own and you must keep the evidence of each offense separate. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. As a general rule, proof of one offense carries with it no inference that the accused is guilty of another offense. However, you may consider the similarities in the testimony of [SJS] and [JPR] concerning any alleged offensive touching with regard to the charged offense of rape. And you may consider the similarities in the testimony of [SRS], [SJS], and [JPR] concerning any alleged offensive touching with regard to the offense of indecent acts with a child.

Id. at 54.

[60] The court's holding regarding the instructions is as follows:

> In this case, the military judge's instructions fell short. The military judge correctly instructed the members that "[t]he burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. As a general rule, proof of one offense carries with it no inference that the accused is guilty of another offense." Nonetheless, the military judge qualified this statement by informing the members that they may "[h]owever . . . consider the similarities in the testimony" of the three alleged victims concerning the alleged rape and indecent acts. On its own, the instruction was susceptible to unconstitutional interpretation: that the members were permitted to conclude that the presence of "similarities" between the charged and uncharged misconduct were, standing alone, sufficient evidence to convict Appellant of the charged offenses.

Id. at 55.

The *Military Judges Benchbook* suggests that where an instruction on propensity evidence is given, the members should also be instructed that:

> You may not, however, convict the accused of one offense merely because you believe (he) (she) committed (this) (these) other offense(s) or merely because you believe (he) (she) has a propensity to commit (sexual assault) (child molestation). Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one (sexual assault) (act of child molestation) creates no inference that the accused is guilty of any other (sexual assault) (act of child molestation). However, it may demonstrate that the accused has a propensity to commit that type of offense. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged.

U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ch. 7, para. 7-13-1 note 4 (1 July 2003).

[61] *Schroder*, 65 M.J. at 57.

[62] *Id.*

offenses.[63] The assistant trial counsel was less direct in the sentencing argument. He did not name the victims but he exhorted the panel to: "Look at those girls. That is why we are here today. They deserve justice. They have been waiting for years for justice. They scream for justice. Members, make sure your sentence delivers justice to those girls . . . ."[64] In the background as he spoke was the slide presentation of all three girls. The defense counsel did not object. The court found that the argument was clearly error.[65] While the court declined to reverse the court-martial findings based on the trial counsels' conduct, the court noted that the argument exceeded an important procedural safeguard of the use of uncharged misconduct when the "[t]rial counsels' presentation invited members to convict and punish Appellant for his uncharged misconduct, as opposed to using that misconduct to inform their judgments regarding the charged conduct."[66] The court reminded the trial counsel that it was improper to demand or even request justice on behalf of the uncharged victim because "as a matter of law, not morality, the court was not convened to render justice to [the uncharged victim]."[67]

Uncharged misconduct can illuminate an accused's conduct and place it in a context which assists the fact finder. However, counsel must be careful to limit its use in argument to the reasons for which it was admitted. As CAAF noted in *Schroder*, "safeguards could be undermined if trial counsel's comments were permitted to range outside the realm of legally 'relevant matters' and express a sense of outrage and injustice regarding the victims of uncharged misconduct."[68] Exceeding those safeguards might feel satisfying in delivering a powerful merits or sentencing argument, but such an argument can imperil your case and if you make a pattern of it, it may imperil your bar license.

Jerry, just remember it's not a lie if you believe it. [69]

A lawyer who believes his client will lie on the stand is caught between two basic obligations. On the one hand, the duties of confidentiality and loyalty allow the free flow of information vital to effective representation. On the other hand, every lawyer is an officer of the court, who owes the court candor in all their own communications and in those they sponsor as proponent of the evidence.[70] The comment of Rule 3.3, Army Regulation 27-26, *Professional Responsibility*, addresses counsel who believe that their clients wish to testify falsely.[71] Counsel are first to attempt to dissuade them, but if those attempts fail, they are to seek withdrawal from the case.[72] In *United States v. Baker*,[73] two experienced defense counsel followed that direction and found themselves accused of ineffective assistance of counsel.[74] One had four years of active duty military service including at least fifteen courts-martial, the other was an activated reservist who had practiced since 1992 including thirty-five federal jury trials and two capital cases.[75]

Staff Sergeant Baker was accused of twelve specifications of various offenses including absence without leave, dereliction of duty, larceny, and willful disobedience.[76] Staff Sergeant Baker contested all those charges.[77] Apparently,

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[63] *Id.*

[64] *Id.*

[65] *Id.* at 58.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 57.

[69] George Costanza from *Seinfeld: The Beard* (NBC television broadcast Feb. 9, 1995).

[70] United States v. Baker (*Baker II*), 65 M.J. 691, 697 (Army Ct. Crim. App. 2007).

[71] AR 27-26, *supra* note 2, R. 3.3 cmt. (Candor Toward the Tribunal).

[72] Rule 3.3, directs counsel as follows:

> If the accused has admitted to the lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the accused insists on exercising the right to testify, the lawyer must advise the client against taking the witness stand to testify falsely. If before trial the accused insists on testifying falsely, the lawyer shall seek to withdraw from representation. See Rule 1.16

Id.

[73] *Baker II*, 65 M.J. 691.

[74] *Id.* at 692.

[75] *Id.*

[76] *Id.* at 700.

pretrial discussions between the accused and counsel led counsel to the conclusion that SSG Baker could not truthfully offer testimony rebutting the allegation that he willfully disobeyed an order to go get a haircut, or offer testimony on a type of printer cartridge relevant to a larceny specification.[78] Counsel and accused apparently further agreed that SSG Baker would not testify at all in part due to his inability to plausibly reconcile certain events.[79] Mid-trial, SSG Baker changed his mind and informed counsel of his desire to testify.[80] After presenting two witnesses, four stipulations of expected testimony, and introducing eight exhibits, the defense took a recess to discuss SSG Baker's newfound desire to testify.[81] Following that recess counsel informed the military judge they sought to withdraw from the case.[82] The judge denied their request and the accused testified in the free narrative form for two hours.[83] After which he was subject to a detailed cross examination and questions from the panel and military judge, all without the assistance of counsel.[84] An officer panel convicted SSG Baker of attempted larceny, absence from his appointed place of duty, and two specifications of willful disobedience.[85] Staff Sergeant Baker appealed his conviction on the grounds that his counsel's attempted withdrawal and subsequent failure to assist him in testifying constituted a deprivation of his Sixth Amendment right to counsel.[86] The Army Court of Criminal Appeals (ACCA) affirmed his conviction and sentence, but their decision was set aside by CAAF, who remanded the case for further factfinding.[87]

Ultimately, two *DuBay* hearings were conducted in the case which permitted the Army court to answer the superior court's questions and render a final decision.[88] The court reviewed the allegation that counsel were ineffective in improperly failing to assist him during his testimony because of their determination that their client would perjure himself.[89]

What Should Counsel Do If They Suspect Perjury?

The CAAF articulated in their holding in *Baker* that a counsel who is concerned that their client may commit perjury should first perform a full investigation of the facts surrounding the questioned testimony.[90] Second, they should proceed as if it's perjury only if they arrive at a "firm factual basis" to believe that the questioned testimony is perjury.[91] Third, the attorney should discuss his concerns with his client by reviewing the facts and explaining the attorney's basis for concluding that the statements are perjury.[92] Next, the attorney should explore whether it's possible to structure the testimony in a way that avoids perjury altogether; if not, then the attorney should review with the accused the potential consequences of

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[77] *Id.*

[78] *Id.* at 695.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 694.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 692.

[86] *Id.* at 693.

[87] *Id*; *see also* United States v. Baker (*Baker I*), 58 M.J. 380, 387 (2003). The CAAF sought replies to seven specific questions:

> (1) What information, if any, led defense counsel to perceive that testimony by Appellant would present an ethical problem? (2) What inquiry, if any, did defense counsel make? (3) What facts were revealed by the inquiry? (4) What standard, if any, did defense counsel apply in evaluating those facts? (5) What determination, if any, did defense counsel make with respect to prospective testimony by Appellant in light of those facts? (6) After making any such determination, what information and advice, if any, did counsel provide to the Appellant? (7) What response, if any, did Appellant make? (8) What information was disclosed by the two defense counsel during their off-the-record conversation with the military judge?

Id.

[88] *Baker II*, 65 M.J. at 693.

[89] *Id.*

[90] *Id.* at 698.

[91] *Id.*; *see also Baker I*, 58 M.J. at 387.

[92] *Baker I*, 58 M.J. at 387–88.

testifying falsely.[93] This advice should include the requirement to testify truthfully, the criminal sanctions for perjury, the tactical effects on the trial of losing credibility, and the requirement that an accused will have to testify in the free narrative form without benefit of counsel and without the attorney arguing any of the questioned testimony at closing.[94] If an accused persists the attorney should request an on the record, ex parte proceeding with the military judge where they explain in front of the accused that the accused wishes to testify and will do so in the free narrative form.[95] Counsel should not elaborate on the reasons behind this unusual format of testimony.[96] Counsel should not move to withdraw unless circumstances have created an irreconcilable conflict between the attorney and client relationship which preclude continued representation.[97]

The military judge should not inquire into the reasons for the unusual testimony format, but should: (1) remind the attorney of his obligation to conduct a full inquiry into the questioned matters; (2) ensure the accused understands the pitfalls of the free narrative form; (3) ask the attorney and client to further discuss the issue during a recess; and (4) direct the attorney to prepare a memorandum describing the attorney's investigations, factual concerns, and advice to the accused.[98] If, after recess, the accused wishes to proceed, the military judge should ensure the defense counsel prepares the memorandum and it should be placed under seal and attached to the record.

How Sure Must Counsel Be That the Questioned Testimony Is Perjury?

Staff Sergeant Baker's counselors were initially reluctant to fully express the reasons they disbelieved their client.[99] By the second *DuBay* hearing counsel expressed that they felt their client's testimony would contain perjury because portions of his testimony could not be reconciled with the version of events he related at the outset of representation and it was completely at odds with all the other evidence in the case.[100] The defense lawyers felt that they had to be certain that their client's version was perjury before they moved to withdraw or declined to assist him.[101] They both reached that conclusion and then attempted to withdraw.[102]

The Army court noted that various courts have articulated similarly high standards for determining whether a client has committed perjury.[103] The Armed Forces courts have not issued a rigid definition for what constitutes a firm factual basis, but they have pointed out that neither inconsistencies with other statements by the accused, testimony at odds with testimony of other witnesses, nor contradictory physical or forensic evidence, constitute clear evidence of perjury.[104]

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[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id*.

[98] *Id.*

[99] *Baker II*, 65 M.J. 691, 694 (Army Ct. Crim. App. 2007).

[100] *Id.* at 695. Among other things the client intended to deny facts about his federal criminal conviction, though those facts were clearly accessible by independent electronic research conducted by the defense and official documents supplied by counsel. *Id.*

[101] *Id.*

[102] *Id*.

[103] *Id*. The court recounted the various courts holdings they reviewed:

> Courts employ a variety of standards to determine whether an attorney justifiably believed a client intended to commit perjury. *See Long*, *857 F.2d at 446* ("firm factual basis" standard); *Johnson*, *555 F.2d at 122* (stating same); *Commonwealth v. Mitchell*, 438 Mass. 535, 781 N.E.2d 1237 (Mass.) (stating same) . . . : *In re Grievance Committee*, 847 F.2d 57, 63 (2d Cir. 1988*)* ("actual knowledge" standard); *Iowa v. Hischke*, 639 N.W.2d 6 (Iowa 2002) ("convinced with good cause" standard); *Wisconsin v. McDowell*, . . . 681 N.W.2d 500 (Wisc. 2004*)* (requiring express admission that accused intends to commit perjury); *Shockley v. Delaware*, 565 A.2d 1373 (Del. 1989) (beyond a reasonable doubt standard); *People v. Calhoun*, . . . 815 N.E.2d 492 . . . (Ill. App. 2004) ("good faith determination" standard). In previously reviewing this case, the CAAF announced it "shall not require a higher standard than [the] firm factual basis" standard discussed in *Johnson*.

Id.

[104] *Id.* at 698–99. The court noted the holding in *People v. Calhoun*, 815 N.E.2d. 492, 503 (Ill. App. 2004), to discuss the broad leeway counsel should grant a defendant's version of the facts before concluding that the defendant is committing perjury. *Id.* The CAAF sets a high standard for counsel determining if questioned testimony is perjury:

The court found that the counsel in *Baker* had a firm factual basis to conclude their client committed perjury.[105] The Army court looked to SSG Baker's original admission to his lawyers that he failed to go get a haircut.[106] They found this different from shifting memories, accounts, or explanations of a consistent denial of wrongdoing.[107] The court also found that SSG Baker's explanations about why he ordered a particular cartridge were patently untrue.[108]

What was the accused told regarding the consequences of testifying falsely?

The court, in line with CAAF's holding, then investigated whether counsel made a serious attempt to dissuade SSG Baker from testifying falsely.[109] Counsel made very limited attempts to dissuade SSG Baker when he notified them during trial of his intent to testify.[110] However, prior to trial, both counsel repeatedly confronted him with their concerns over inconsistencies in his testimony.[111] Further, on the record, the military judge laid out step by step what would occur if the accused persisted in testifying.[112] Finally, the court adopted the *DuBay* judge's findings that given the accused temperament, any attempt to limit his testimony to areas where there was no risk of perjury would have failed.[113]

> When the question of perjured testimony by a defendant arises, we require that the lawyer act in good faith and have a firm basis in objective fact. Conjecture or speculation that the defendant intends to testify falsely are not enough. Inconsistencies in the evidence or in the defendant's version of events are also not enough to trigger the lawyer's obligation not to elicit false testimony, even though the inconsistencies, considered in light of the Commonwealth's proof, raise concerns in counsel's mind that the defendant is equivocating and is not an honest person. Similarly, the existence of strong physical and forensic evidence implicating the defendant would not be sufficient. Counsel can rely on facts made known to him, and is under no duty to conduct an independent investigation.

Id. (citations omitted) (quoting *Calhoun*, 815 N.E.2d. at 503).

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id*. Staff Sergeant Baker claimed he ordered a particular printer cartridge because it was so popular it was "flying off the shelves," in fact their was no record that type of cartridge had ever been ordered or stocked and the unit supply sergeants interviewed by the defense were unanimous that none of the unit's computers used that type of cartridge. *Id.*

[109] *Id.* at 699–700.

[110] *Id.*

[111] *Id.*

[112] *Id.* The military judge's exchange with SSG Baker went as follows:

> Military Judge: What I am telling you, Sergeant Baker, is if you persist in this wish to testify, I can't tell you that you can't testify. But your attorneys don't have to basically go along with offering your testimony and they're not going to cooperate in offering what they believe might be perjured testimony to the panel.
>
> So if you want to do this, if you want to testify without the assistance of counsel, you can do that. But what that means is when the members come back, I'm going to say—I'm going to say the defense calls Sergeant Baker to the stand. The trial counsel is going to swear you in. And then you're going to testify all by yourself.
>
> Now one of the dangers there is, when you do that, you don't have the assistance of a lawyer who has been trained to keep you away from certain areas of testimony that might not be helpful to yourself. One of those areas is that threat of this prior conviction, which at this point is not admissible on the merits of the case; but, depending on what you say, it may come in on cross examination, because you are going to be cross examined. So that means the government's side, with the two lawyers they have there, are going to be able to go at you and, basically, your defense counsel aren't going to do anything to help you.
>
> Do you understand that?
>
> Accused: Yes, ma'am.
>
> Military Judge: Do you understand the risk you run when you get on the stand and you don't have the help of a lawyer helping you through your testimony?
>
> Accused: Yes.
>
> Appellant asked the military judge if, during his testimony, he could refer to notes that he had prepared prior to trial. The military judge advised him that he could do so, that the notes would be marked as an exhibit, that the government would have the opportunity to review the notes, and that he could be cross-examined on the notes. The military judge returned to the subject of testifying without the benefit of counsel:
>
> Military Judge: And the other thing I want to say—I want to say a couple of other things—like I said, when you do this, you know, we have lawyers represent people for a purpose, and they know what things to avoid and what things to emphasize. And when you take the stand like this, you're not going to have the assistance of counsel, and you're going to be cross-examined, and if the members have questions they're going to be able to ask you, and you're not going to have a lawyer there to talk to about whether or not you should answer, or how you should answer it.

The court of appeals ultimately agreed that counsel had acted with sufficient diligence in investigating and concluding that SSG Baker would perjure himself. Once they did it was apparent that they were not only permitted but required to refrain from assisting in the perjury.[114] Counsel in the *Baker* case failed to submit the memorandum suggested by the court explaining their reasons for suspecting perjury. That failure led to two *DuBay* hearings and a decade of litigation[115] in lieu of summary affirmance. The lesson is there is value in complying with the court's request to document your reasons, because your client could put you on the edge despite your best efforts. If that happens savvy counsel will document how they got there in line with CAAF's guidance.

Conclusion

Trial advocacy on the edge is about "leaning forward" with experts, making full use of uncharged misconduct to prove an offense, and knowing how to deal with the less than credible accused. Trial advocates should know that an expert witness can provide evidence about how victims behave, but not conclusions about whether those victims are truthful. They should know that they can parallel an uncharged victim's story with that of the victim at issue to show a pattern in the accused conduct. They cannot however demand justice for an uncharged victim. If an accused wants to offer false testimony you must first be sure that it's not just a faulty memory at work. If you have a firm factual basis to know your client's proposed testimony will be perjury, never violate a client's confidence, but never assist a client in perjuring himself. The three cases we reviewed from last year's term will help you negotiate the edge without going over.

> The other thing is—
>
> Accused: Does—does—is the same procedure going to be followed? I mean, will they go through you?
>
> Military Judge: The panel questions? Yes. And I will decide whether or not they're asked.
>
> But your counsel aren't going to get a chance to say objection because they're not going to participate in any way with your testifying.
>
> . . . .
>
> But when they go to do their closing argument, they're not going to refer to things you said. They're going to attack in other ways, they're going to attack the government's case I'm sure, but they're going to do it with the evidence that's been presented so far.
>
> Do you understand that?
>
> Accused: Yes, ma'am.

Baker I, 58 M.J. 380, 382–84 (2003).

[113] *Baker II*, 65 M.J. at 700.

[114] *Id.* at 698. A client has a constitutional right to testify and to assistance of counsel, but does not have a right to testify falsely with the assistance of counsel. *Id.*

[115] *Id.* at 692.