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## Quieting Cognitive Bias with Standards for Witness Communications

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# Quieting Cognitive Bias with Standards for Witness Communications

MELANIE D. WILSON\*

*Last year, as part of a project to revise the ABA Criminal Justice Standards for Prosecution and Defense Functions, the ABA Criminal Justice Section initiated roundtable discussions with prosecutors, criminal defense lawyers, and academics throughout the United States. The Standards under review provide aspirational guidance for all criminal law practitioners. This Article stems from the Criminal Justice Section's undertaking. It considers the wording, scope, and propriety of several of the proposed changes that address lawyer-witness communications. It begins with a discussion of the effects of cognitive bias on these communications and explains why carefully tailored Standards may lessen the detrimental impact of those biases. Then, the Article examines in detail three challenging, yet common aspects of communications that the Standards seek to influence: (1) communicating with witnesses about their future communications with opposing counsel, (2) communicating warnings to witnesses, and (3) communicating with experts. Ultimately, the Article argues for clarity in the Standards to reduce the impact of unwanted cognitive bias to which we are all vulnerable.*

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## INTRODUCTION

Just trial outcomes depend on witness accuracy. Favorable and persuasive testimony is equally essential to a winning verdict. As a result, all lawyers talk to putative witnesses when preparing for hearings and trials.<sup>1</sup> At least in theory, these meetings enhance the witness's ability to tell her truthful story in a logical way that the jury or judge can follow and understand. In practice, lawyers fill these meetings with suggestions about portions of the story the witness should downplay or emphasize, tips about words the witness should use or avoid, examples of strategies—such as looking at the jury when answering questions—or mannerisms the witness should employ, and possible answers to anticipated cross-examination questions. Portions of these conversations occur over the phone. Many are held in person, sometimes weeks before the court proceeding. Depending on a witness's importance, credibility, and vulnerability, a lawyer may meet with a witness repeatedly to reassure and to “prepare” her. Some recalcitrant witnesses take coaxing. All too often, these discussions last only a few minutes and happen on the day of the court proceeding, when the lawyer, pressed for time, may

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1. If the lawyer does not talk with the witness, the lawyer's investigator, paralegal, or other representative undoubtedly will.

exhibit little tact or tolerance, and when her mind may wander, preoccupied with winning the case. Regardless of the place, timing, or length of these meetings, lawyers should receive clear guidance about topics they may, may not, and ought not cover. Such guidance is warranted because these conversations will either advance or undermine the witness's truthful testimony.

Several of the ABA Criminal Justice Standards for Prosecution and Defense Functions, which are currently undergoing careful study and revision, are directed at communications between witnesses on the one hand, and prosecutors or criminal defense lawyers on the other.<sup>2</sup> This Article explores some of these Standards and argues, above all else, for clarity.

Unrelated groups have difficulty understanding each other even in the best of circumstances. When lawyers talk ambiguously with a witness, using legally significant terms, the witness may misunderstand the intended meaning altogether. If the lawyer and witness are from different cultures or socioeconomic backgrounds, the witness may not hear the information the lawyer believes she is conveying.<sup>3</sup> Also, if lawyers are left to guess about the proper parameters of these conversations, they will be guided by their own cognitive biases, which may ultimately impair witness truth-telling. Cognitive bias will tend to convince lawyers, at least subconsciously, that their "preparation" of a witness will foster the witness's ability to tell a story effectively rather than influence the witness to deviate from her own version in ways that advance the interests of the lawyer's client.<sup>4</sup> Such implicit and related biases cause lawyers to view their case, and their own actions and communications in furtherance of that case, as advancing justice.<sup>5</sup> Thus, to the extent that ethics rules and aspirational standards are vague or silent on a subject, lawyers will tend to construe the ambiguities and fill the gaps with self-serving interpretations. Moreover, because witness communications permeate both the investigative and adjudicative phases of a case, guidance for ethical witness communications should extend to both.

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2. See STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION (Proposed Revisions 2009); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION (Proposed Revisions 2010). The Author will, in the course of this Article, draw conclusions about the behavior, thoughts, and actions of witnesses, victims, and attorneys. These observations derive from her own experience as a prosecutor, as well as from discussions with other attorneys both in practice and at roundtable discussions.

3. See, e.g., Michelle LeBaron, *Cross-Cultural Communication*, BEYOND INTRACTABILITY (July 2003), [http://www.beyondintractability.org/essay/cross-cultural\\_communication](http://www.beyondintractability.org/essay/cross-cultural_communication) ("[M]iscommunication is likely to happen, especially when there are significant cultural differences between communicators.").

4. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000); see also *infra* Part I.

5. *Id.* at 1085-87.

The need for firm and sure guidance in the Standards is exemplified by several cases that recently surfaced in which trial outcomes seemingly rested on testimony tainted by pretrial communications. In some of these cases, the questionable testimony was the product of a prosecutor's direct influence. In others, government investigators engaged in misconduct to strengthen the government's case. In one, defendant Mark Sodersten was convicted of "beating, sexually assaulting and slicing the throat of a 26-year-old mother of two young children" based on eye-witness testimony from "the victim's 3-year-old daughter and one of the victim's neighbors."<sup>6</sup> However, two audio recordings, discovered long after the conviction became final, revealed that during detectives' interviews of the victim's neighbor, the neighbor said that he "made up the entire story about seeing Sodersten attack the victim, and that [he had been] on PCP the night of the attack and couldn't remember anything that happened."<sup>7</sup> The two recordings were never produced to the defense.<sup>8</sup> In another case, the district attorney in Burleson County, Texas declared in October 2010 the innocence of Anthony Graves, who had been convicted of murdering six people and sentenced to death row by the previous district attorney.<sup>9</sup> The new district attorney suggested that the previous prosecutor convicted Graves using witnesses who were pressured into providing testimony favorable to the government.<sup>10</sup> According to a newspaper account, the new district attorney "accused the former district attorney of hiding evidence and threatening witnesses," including threatening to prosecute the wife of a key cooperating witness, if the witness did not testify that Graves helped the witness commit the murders.<sup>11</sup>

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6. See Mark Curriden, *Harmless Error? A New Study Claims Prosecutorial Misconduct Is Rampant in California*, A.B.A. J., Dec. 2010, at 18, 18–19 (discussing a study by the Northern California Innocence Project at Santa Clara University School of Law that evaluated the prevalence of prosecutorial misconduct in California and concluded that "prosecutorial misconduct in the nation's most populous state continues to be a problem, and that prosecutors are seldom held accountable for [that] misconduct").

7. *Id.*

8. *Id.* Notably, the failure to produce the tapes was not the fault of the prosecutor, who did not know about them. *Id.*

9. See Leonard Pitts, Editorial, *An Innocent Man*, BUFFALONEWS.COM (Nov. 6, 2010), <http://www.buffalonews.com/editorial-page/columns/national-views/article243765.ece> (explaining how the new district attorney criticized the prior district attorney for prosecuting Graves although "not a single thing . . . says Anthony Graves was involved").

10. See *id.*; Jordan Smith, *Anthony Graves Case Raises the Dead . . . Again*, CHRON.COM (June 13, 2008), <http://www.chron.com/disp/story.mpl/metropolitan/7266988.html> (explaining how the district attorney failed to provide the defendant with an exculpatory recantation of the primary witness and allowed the witness to give perjured testimony on the witness stand); see also *Story of an Injustice: Anthony Graves*, ANTHONYGRAVES.ORG, <http://www.anthonysgraves.org/documents/ANTHONYGRAVESCASE.pdf> (last visited May 23, 2011).

11. Brian Rogers, *Team Overturning Graves Case Blasts Ex-DA*, CHRON.COM (Oct. 28, 2010), <http://www.chron.com/disp/story.mpl/metropolitan/7266988.html>. Defense lawyers, too, have allegedly

Judges also have publicly expressed exasperation with the way some prosecutors have manipulated witnesses during pretrial communications. For instance, Judge Cormac Carney asserted that prosecutors in the case against the cofounders of Broadcom Corporation “intimidated and improperly influenced” each of the defendants’ three witnesses.<sup>12</sup> One prosecutor allegedly threatened a defense witness with perjury charges “if he testified the same way he had during an SEC deposition.”<sup>13</sup> And, there is the highly publicized case of former Alaska Senator Ted Stevens in which prosecutors admitted to failing to produce key evidence to the defense or the court, including notes from the government’s interview with its star witness, a construction contractor.<sup>14</sup> The notes would have revealed that the witness’s trial testimony was inaccurate.<sup>15</sup>

Clear instructions defining appropriate and inappropriate witness communications are likely to reduce instances of attorney wrongdoing, at least when lawyer misconduct is inadvertent or the result of difficult judgment calls. Definitive guidance will also make it easier to justify discipline for unscrupulous lawyers who engage in improper communications, as their claims of mistake or ignorance will prove less convincing.

While all lawyers occasionally face questions about the proper limits of their communications with witnesses, prosecutors and criminal defense attorneys confront these issues frequently because of the trial-

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tried to influence witnesses to give false testimony to help a client’s cause. See Mark Fass, *New York Defense Attorney’s Trial Begins in Witness Tampering Case*, N.Y. L.J. (July 28, 2009), <http://www.law.com/jsp/article.jsp?id=1202432578327&slreturn=1&hbxlogin=1> (reporting on the trial of a well-known New York defense lawyer who allegedly bribed a witness to give testimony favorable to his drug kingpin client); see also Cameron Probert, *Witness Tampering Trial Begins for Quincy Attorney*, COLUMBIA BASIN HERALD (May 28, 2009, 12:00 AM), [http://www.columbiabasinherald.com/news/local\\_business/article\\_5bcd971-3174-5503-9b54-7a604bfb996c.html](http://www.columbiabasinherald.com/news/local_business/article_5bcd971-3174-5503-9b54-7a604bfb996c.html) (explaining the prosecution’s case depended heavily on one witness, whom the prosecution had subpoenaed, so defense counsel had told the witness to leave town to avoid testifying against the defendant, which the witness did).

12. Anna Stolley Persky, *Aggressive Justice*, A.B.A. J., May 2010, at 36, 37.

13. Stuart Pfeifer, *Testimony Ends in Trial of Broadcom Ex-CFO*, L.A. TIMES, Dec. 11, 2009, at B2.

14. Nedra Pickler & Matt Apuzzo, *Judge Opens Case Against Ted Stevens Prosecutors*, HUFFINGTON POST (Apr. 7, 2009, 7:37 PM), [http://www.huffingtonpost.com/2009/04/07/judge-opens-case-against\\_n\\_184090.html](http://www.huffingtonpost.com/2009/04/07/judge-opens-case-against_n_184090.html); Jason Ryan, *Key Evidence in Stevens Case Tossed out*, ABC NEWS (Oct. 9, 2008), <http://abcnews.go.com/TheLaw/FedCrimes/Story?id=5989214&page=1>; see also *United States v. Golding*, 168 F.3d 700, 701–02 (4th Cir. 1999) (vacating and remanding the defendant’s conviction for possession of a firearm by a convicted felon because of prosecutor’s misconduct in threatening to prosecute the defendant’s wife for possession of marijuana if the wife testified for the defense at trial concerning ownership of the gun); *United States v. Scheer*, 168 F.3d 445, 449–51 (11th Cir. 1999) (reversing because the prosecutor threatened his own witness and the government failed to disclose this threat to the defense); *United States v. Vavages*, 151 F.3d 1185, 1188 (9th Cir. 1998) (reversing and remanding because the prosecutor threatened to prosecute the defendant’s wife for perjury and to withdraw her plea agreement in another case in order to convince the wife not to testify as the defendant’s alibi).

15. See Pickler & Apuzzo, *supra* note 14; Ryan, *supra* note 14.

laden nature of their work. The proposed ABA Criminal Justice Standards for Prosecution and Defense Functions attempt to direct these recurrent communications, giving aspirational guidance beyond that already found in the ABA Model Rules of Professional Conduct. Relying, in part, on roundtable discussions with judges, academics, prosecutors, and defense counsel in Florida, Rhode Island, and Ohio,<sup>16</sup> this Article considers whether the proposals strike the right balance. In the process of examining the wording, reach, and limits of several of the proposed Standards, this Article stresses the advantages of explicit direction.<sup>17</sup> Such guidance will reduce the harmful influence of cognitive and social bias on lawyers' rational decisionmaking<sup>18</sup> and help identify prosecutors and defense lawyers who are practicing below the ethical baseline.

Understanding that clear guidance is important, the Standards could be implemented using various approaches. At one extreme, prosecutors and defense lawyers could be told to refrain from "advising" unrepresented victims and third parties.<sup>19</sup> In support of such a bright-line rule, the Standards might declare that lawyers may impart "information" about the judicial process, including when and where the witness will testify and the manner in which cross-examination is likely to occur, but dissuade lawyers from recommending any particular course of action, such as possible responses to direct or cross-examination questions. Of course, drawing a useful line between advice and information would prove difficult, at best, and potentially meaningless if the ambiguous terms were not defined adequately. A second possibility would be to

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16. These roundtable discussions were sponsored and coordinated by the ABA Criminal Justice Section and held at various law schools across the United States.

17. In this Article, the words "proposed Standards" refer to the pending draft revisions of the Criminal Defense and Prosecution Function Standards, whereas the words "current Standards" reflect the Standards in place before the revision project. The proposed Prosecution Function Standards are printed in full in Rory K. Little, *Introduction: The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, app. (2011). The proposed Defense Function Standards are printed in full in Rory K. Little, *The Role of Reporter to a Law Project*, 38 HASTINGS CONST. L.Q. 747, app. (2011).

18. See discussion *infra* Part I; see also Alafair Burke, Commentary, *Brady's Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 576–78 (2007) [hereinafter Burke, *Brainteaser*] (discussing confirmation bias and selective information processing); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590–91 (2006) [hereinafter Burke, *Improving*] (arguing that prosecutors are irrational humans and noting cognitive research demonstrating that humans systematically hold a set of cognitive biases); Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2133–34 (2010) [hereinafter Burke, *Talking*].

19. See MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010) ("The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are . . . in conflict with the interests of the client."); WIS. RULES OF PROF'L CONDUCT SCR 20:3.8 (d)(1) (2010) ("When communicating with an unrepresented person a prosecutor may discuss the matter . . . but a prosecutor, other than a municipal prosecutor, shall not: (1) otherwise provide legal advice to the person . . .").

allow prosecutors and defense lawyers to convey “information” to witnesses, but only for certain well-defined topics. Other subject matter areas would be prohibited. Under this system, lawyers might be permitted to discuss the process of cross-examination but prohibited from suggesting answers to potential questions. This second approach might provide more certain guidance but would require an unwieldy and lengthy list of topics that would inevitably prove insufficient. No doubt, a list would fail to anticipate all of the situations that prosecutors and defense lawyers eventually face. The proposed Standards opt for a middle approach, offering certain dos and don’ts while also providing general guidance covering a wide range of situations.

Before turning to the specifics of the proposed Standards, Part I of this Article underscores a few of the effects of cognitive bias on lawyers’ communications with witnesses and explains why carefully tailored standards may lessen the detrimental impact of such biases. Understanding that the topic of communicating with witnesses is wide ranging and that several of the proposed Standards cover the subject matter, Part II narrows the focus, examining three challenging, yet common, aspects: (1) talking to witnesses about their future communications with opposing counsel, (2) communicating warnings to witnesses, and (3) communicating with experts. These three areas of witness contact are among the most important covered by the proposed Standards. Moreover, the Standards addressed to these areas are among those that call for the most guesswork.

#### I. SUPPORT FOR ASPIRATIONAL STANDARDS GUIDING LAWYER-WITNESS COMMUNICATIONS

“Research in the behavioral sciences has demonstrated that individuals are systematically biased in their predictions of the probable results of various events.”<sup>20</sup> In other words, actors’ “self-serving” bias causes them to “interpret information in ways that serve their interests or preconceived notions.”<sup>21</sup> For prosecutors and criminal defense lawyers, most of whom spend considerable time preparing witnesses to testify at hearings and trials, these natural human biases may lead them to grow myopic about the facts of a case or the credibility of the witnesses telling the trial story. Lawyers may hear what they hope and expect to hear: facts that support rather than undermine their client’s interests. When these ordinary biases combine with trial lawyers’ instinctive affinity for winning cases, there are robust reasons for lawyers to influence

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20. Korobkin & Ulen, *supra* note 4, at 1085.

21. *Id.* at 1093; see also Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1337–38 (1995) (“There is considerable evidence from the psychology literature of a self-serving bias in judgments of fairness.”); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 140 (1993).



witnesses' testimony in subtle or obvious ways, and additional reasons for the lawyers to attempt to isolate witnesses from the influence of opposing counsel, who may attempt to sway the witnesses' story in an opposite manner. Similarly, having become convinced that her side represents "right," "fairness," or "just desserts," advocates who aggressively and zealously seek to advance their side will tend to resist ethically desirable protections for witnesses. As discussed in Part II, this resistance may result in lawyers' reluctance to warn witnesses against self-incrimination or to shrink from admonishing witnesses about inadvertent waivers of privileged communications with spouses, lawyers, and psychiatrists. It also may undermine integrity-promoting courses of action such as sharing material and favorable evidence with defense counsel.

The dominant theory on cognitive bias suggests that "implicit attitudinal biases are especially important in influencing nondeliberate or spontaneous discriminatory behaviors."<sup>22</sup> For example, "anchoring" bias causes actors to tend to assess situations with preconceived notions and to fail to reassess the situation as new information develops.<sup>23</sup> Biases, such as these, "are not readily capable of being unlearned. Instead, they affect us all with uncanny consistency and unflappable persistence."<sup>24</sup> Thus, to the extent prosecutors and defense lawyers are communicating with witnesses without definitive guidance to cabin their "nondeliberate" and "spontaneous" decisions about what and how to communicate, these lawyers are likely to evaluate the witnesses' stories, other corroborating or refuting evidence, and other aspects of a case with their own implicit attitudinal biases. In many instances, these biases will lead these advocates to overestimate the credibility of a witness, discount the reliability of opposing evidence, and undeservedly doubt the motives of the opposing party or opposing counsel. As a result, prosecutors may take unnecessarily protective postures regarding victims, deciding for example that they should be warned against sharing information with defense counsel. Defense lawyers may be tempted to permit a confused witness to continue to believe that she is talking to a government representative. Both the prosecution and defense may be attracted to "expert" witnesses who are known to favor one party over the other.<sup>25</sup>

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22. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 961 (2006).

23. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 640-72 (1999) (presenting a brief overview of behavioral research and literature).

24. *Id.* at 633 (footnote omitted).

25. There are hired-gun "expert" witnesses notorious for testifying only for the prosecution or always for the defense. See, e.g., *Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 27 (1st Cir. 1998) (noting that the defendant's expert witness in a civil case had testified thirty-six times for the defendant, representing eighty percent of his expert testimony); *Chauppette v. Northland Ins. Co.*, No.

These tendencies are predictable in an adversarial system designed to favor the rival who presents the most compelling evidence and the most persuasive testimony in a one-time, all-or-nothing trial. Although understandable in a competitive litigation system, none of these practices encourages witness accuracy or promotes confidence that the system is equitable. Thus, to the extent the ABA Criminal Justice Section crafts and adopts standards that result in a check on cognitive biases—which are generally exacerbated by every trial lawyer’s desire to win a case—the project is a worthwhile and compelling endeavor.

Although cognitive biases can prove stubborn to combat, behavioral research indicates that clear guidance can promote desired behaviors or, for purposes of this Article, ethical and principled witness communications. This research suggests that behavior can be altered by shaping social norms, provided the community subjected to such norms is “generally prone to respect the law.”<sup>26</sup> Whatever else might be said about lawyers, as a whole we are a community that respects the law. We study it. We “brief” it in excruciating detail. We draft it and lobby for its passage. We hide behind it when it benefits us. We distinguish it when our situation falls slightly outside of its established strictures. In short, if researchers are correct that a community that respects the law is subject to influence from social norms, then the Prosecution and Defense Function Standards will impact lawyer behavior by providing such norms. The Standards will remove the need for lawyers to decide on a case-by-case, witness-by-witness basis what ethical communication demands. The key, of course, is to adopt standards that are sufficiently certain and authoritative so that prosecutors and defense lawyers understand and defer to them.<sup>27</sup>

Having discussed in Part I the advantages of definitive standards in reducing undesirable cognitive bias, the next Part examines three

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08-4193, 2009 WL 4060452 (E.D. La. Nov. 19, 2009) (citing cases in which courts required discovery disclosure on a percentage of expert’s testimony for one party and total income from giving expert testimony, because the information was indicative of bias); *Behler v. Hanlon*, 199 F.R.D. 553 (D. Md. 2001) (recognizing probative value on the issue of bias of the defense expert’s history of testifying for the defendant and for insurance companies defending personal injury suits).

26. Korobkin & Ulen, *supra* note 4, at 1131–32 (“The primary deterrent effect many laws have on undesirable behavior might not be the direct increase in the price of the behavior through the threat of fines, civil liability, or jail sentences, but the encouragement of a social norm against the activity.”); see also Greenwald & Krieger, *supra* note 22, at 963 (noting that some studies have shown that “implicit biases are malleable”).

27. For a discussion on the degree of specificity the Standards should take, see Ellen S. Podgor, *The Role of the Prosecution and Defense Function Standards: Stagnant or Progressive?*, 62 HASTINGS L.J. 1159 (2011). Also as part of these roundtable discussions, Professor Andrew Taslitz discussed cognitive biases in prosecution. See Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 HASTINGS L.J. 1285, 1290–93 (2011).

common aspects of lawyer-witness communications that the proposed Standards seek to influence.

## II. THREE CHALLENGING, YET COMMON, ASPECTS OF LAWYER-WITNESS COMMUNICATIONS THAT THE PROSECUTION AND DEFENSE FUNCTION STANDARDS SEEK TO SHAPE

At some point, every lawyer who works as a prosecutor or criminal defense lawyer will: (1) desire to insulate a vulnerable witness from manipulation by opposing counsel, (2) wonder whether she should caution an unrepresented witness against volunteering self-incriminating information or offering evidence protected by some other legal protection, such as privilege, or (3) seek to select and prepare an expert witness in a manner that ensures testimony favorable to a client's cause. Below, and in turn, this Part considers the guidance the proposed Standards offer for these and related issues.

### A. TALKING TO WITNESSES ABOUT THEIR FUTURE COMMUNICATIONS WITH OPPOSING COUNSEL

Because ours is an adversarial and competitive justice system, in which one side benefits from the opposing party's lack of preparation or information, prosecutors and defense counsel may be predisposed consciously or subconsciously to discourage witnesses from talking to opposing counsel.<sup>28</sup> Prosecutors often feel particularly protective of victims and may experience a strong inclination to dissuade them from giving interviews to anyone outside of the government, especially in cases of violent crime and fraud in which victims are readily identifiable and may be at risk for further victimization or intimidation.<sup>29</sup> Regardless of which side the lawyer represents, the type of case, or the number of victims, from a competitor's perspective, there is no advantage when a witness shares information with opposing counsel. Exposure to opposing counsel may reveal a witness's loss of memory, confusion, fear of testifying, or a lack of confidence in her ability to testify persuasively. A witness might unwittingly bring to light a party's strategy or the weaknesses a lawyer perceives in the evidence. Moreover, when a witness talks with opposing counsel, she necessarily becomes susceptible to potential impeachment later. Because the prosecution bears the burden of proof, and often is the first to interview fragile victims, the temptation to "protect" evidence and victims from exposure to an

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28. At some point, such "discouragement" would violate Model Rules of Professional Conduct 3.4(a) and 3.4(f). MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2010) ("A lawyer should not . . . obstruct another party's access to evidence . . ."); *id.* R. 3.4(f) ("A lawyer should not request a person . . . to refrain from voluntarily giving relevant information to another party . . .").

29. This conclusion derives from my own experience as a former prosecutor and from views expressed by prosecutors in the roundtable discussions I attended for this project.

adversary may be particularly acute for prosecutors. Furthermore, in each geographic region I visited for this project,<sup>30</sup> prosecutors indicated that witnesses contacted by the defense routinely report confusion about the identity and affiliation of defense counsel or defense counsel's investigator.<sup>31</sup> Witnesses regularly believe that they are talking to the government when they are, in fact, speaking with the defense.<sup>32</sup>

### 1. *The Prosecution Function Standards*

Conflation of the prosecution and defense is reportedly common, even when the defense takes precautionary steps—such as giving each witness an identifying business card—to avoid these misunderstandings.<sup>33</sup> These mix-ups can lead witnesses to feel tricked and mistreated by the justice system. Witnesses are typically chance participants in the criminal process. They either saw or heard something of relevance, or they were victimized by someone. As a result, and not uncommonly, they take part reluctantly and with little understanding of the intricacies of the process. If fully informed about how the system operates, some witnesses might choose to talk only to the prosecution. Should prosecutors have discretion to decide on a case-by-case basis whether to tell a victim or witness that she should remain wary of all communication with defense counsel? Proposed Standards 3-4.1 and 3-3.5 provide limited guidance on this subject.<sup>34</sup>

Perhaps because these issues are open to significant debate, the proposed Standards recommend a significant modification to the current Standards. Proposed Standard 3-4.1 eschews the language in current Standard 3-3.1—a self contained and express provision on the topic of witness communications with defense counsel<sup>35</sup>—and, instead, points prosecutors to the recently adopted ABA Criminal Justice Standards for Prosecutorial Investigations (“Investigation Standards”).<sup>36</sup> Current

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30. As part of the ABA Criminal Justice Section project on the ABA proposed Standards, I visited Tampa, Florida; Bristol, Rhode Island; and Cleveland, Ohio. In each location, participants discussed various proposed Standards, including many of those I present in this Article.

31. The ABA Model Rules speak to every lawyer's duty to reduce obvious witness confusion on this point. See MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010) (“When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”). A duty to reduce obvious confusion does not mean that confusion is uncommon or that the defense is intentionally creating it.

32. Defense counsel present at the roundtable discussions shared prosecutors' concern about witness confusion. One defense lawyer in Ohio explained that he always gives his business card to witnesses as concrete and tangible proof, if needed later, that he did not misrepresent his identity.

33. See *supra* notes 29 & 32.

34. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION §§ 3-3.5, 3-4.1 (Proposed Revisions 2010).

35. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1(d) (3d ed. 1993).

36. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.1 (Proposed Revisions 2010). The Investigation Standards were adopted in 2008. See generally STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS (2008).

Standard 3-3.1 expressly prohibits prosecutors from discouraging witnesses from talking with the defense. It provides: "A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give."<sup>37</sup>

In contrast, the proposed Standards replace this language with the following cross-reference to the Investigation Standards: "When performing an investigative function, prosecutors should be familiar with and follow the ABA Standards on Prosecutorial Investigations."<sup>38</sup> In turn, Investigation Standard 1.4(d) says:

Absent a law or court order to the contrary, the prosecutor should not imply or state that it is unlawful for potential witnesses to disclose information related to or discovered during an investigation. The prosecutor may ask potential witnesses not to disclose information, and in doing so, the prosecutor may explain to them the adverse consequences that might result from disclosure (such as compromising the investigation or endangering others).<sup>39</sup>

As an initial matter, the reference to the Investigation Standards is curious because the preamble to those Standards recognizes directly that "[a] prosecutor's investigative role, responsibilities and potential liability are different from the prosecutor's role and responsibilities as a courtroom advocate."<sup>40</sup> Indeed, prosecutors sometimes meet with witnesses and victims when determining whether and what crime to charge, but more often, they talk with witnesses to prepare them to testify at hearings and during trials.<sup>41</sup> Thus, to the extent any regulation of communications is warranted, guidance should be available for both contexts. Moreover, providing a separate Standard for the adjudicative context recognizes the prosecutor's differing roles in these related, but different, environments.<sup>42</sup> Because prosecutors are at least as likely to deal with witnesses in the adjudicative context as they are when investigating crimes, the topic deserves its own express discussion in the Prosecution Function Standards. In the roundtable discussion sessions, judges, prosecutors, and defense counsel agreed.<sup>43</sup>

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37. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1(d) (3d ed. 1993).

38. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.1 (Proposed Revisions 2010).

39. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.4(d) (2008).

40. *Id.* at pmb1.

41. This was certainly my experience as a prosecutor and my observation about other prosecutors around me.

42. See *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 861-62 (2009) (holding that absolute immunity extends to prosecutors when acting as officers of the court and pursuing adjudicative prosecution functions but not when engaged in investigative or administrative tasks).

43. See *supra* notes 16 & 30.

More substantively, the Investigation Standards fail to address one of the most controversial topics on the subject of communicating with witnesses: whether a prosecutor may tell a witness of the many potential pitfalls of talking to the accused's lawyer, under what circumstances, and when the prosecutor's warning has gone too far. Although Investigation Standard 1.4(d) allows the prosecutor to warn a witness about the risks of disclosing information generally, it says nothing about the witness's communications with defense lawyers.<sup>44</sup> Arguably, the silence in the Investigation Standard indicates the ABA's approval of such tactics. Normally, silence might suggest a lack of contemplation of the subject, but when viewed in light of current Standard 3-3.1, which expressly informs prosecutors not to "discourage or obstruct communication between prospective witnesses and defense counsel,"<sup>45</sup> the removal of the language implies approval. Whether the Standard approves or disapproves of this type of advice, it should be made clear. Otherwise, it leaves prosecutors to guess about this important and persistent matter.

Assuming that the Standard should address this issue, what guidance is appropriate? A Standard could be devised to allow prosecutors to guard witnesses against confusion over lawyer affiliation and other communications that might leave witnesses feeling misguided. However, if such a Standard were implemented and prosecutors were allowed to caution witnesses about talking with the defense, further guidelines would be needed to outline how "discouraging" prosecutors could be. An early draft of the proposed Standards permitted a prosecutor to warn a witness that sharing information could result in adverse consequences to the prosecution's case or to other witnesses; it also spoke more directly about talking to defense counsel:

A prosecutor should not tell, or encourage others to tell, witnesses that they may not communicate with defense counsel. A prosecutor may, however, ask potential witnesses not to disclose information, and may explain to witnesses the possible adverse consequences that might result from disclosure (such as compromising the investigation or endangering others).<sup>46</sup>

Thus, the earlier proposal was akin to the Investigation Standard. It provided that prosecutors should not tell witnesses that they are prohibited from talking with the defense, but it left room for prosecutors to discourage a victim or any other witness from engaging in those communications.<sup>47</sup> Assuming that it is desirable for a prosecutor to be

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44. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.4(d) (2008).

45. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1(d) (3d ed. 1993).

46. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.1(d) (Proposed Revisions 2009). In every meeting of the roundtable discussions, the groups preferred current Standard 3-3.1(d) to the proposed Standard, which merely cross-references the Investigation Standards.

47. *Id.*

given discretion to deter some victims and other witnesses from talking to the defense (and I believe that it is), the prosecutor's discretion should be restricted in a finite way. For instance, the Standard might allow prosecutors to caution witnesses about talking to the defense only when prosecutors have reason to believe that the victim or case will be harmed if the witness shares information with the defense, or when they believe that a witness may mistake the defense for the government.

As is, the proposed Standard seems to permit extensive cautioning about defense counsel, without indicating when such cautioning goes too far. It allows a prosecutor to tell a crime victim or other witness that a representative of the defense may try to contact the victim and that the victim has no obligation to talk to the representative.<sup>48</sup> It does not forbid the prosecutor from cautioning the victim to remain skeptical of the defense because the defendant's lawyer may be quick to undermine the victim's interests and may try to trick the victim into saying something that she will later regret. The proposed Standard does not prohibit the prosecutor from suggesting that if the victim or witness talks to the defense, the defense may later try to embarrass the witness or to twist her words. It also seems to sanction other communications in which the prosecutor tells the victim that she should feel free to hang up on the defense lawyer or to refuse to answer the door in order to avoid interaction with the defense.<sup>49</sup> As written, the proposed Standard would not prohibit a prosecutor from sharing anecdotes with a witness about negative experiences with this particular defense lawyer, such as explaining how the lawyer embarrassed a victim or witness in court after the witness naively and innocently talked to the lawyer informally before the proceeding. Indeed, under the proposal, a prosecutor would be free to muse out loud with a witness about a worst-case scenario in which the defendant's lawyer surreptitiously records the witness's statement and later, in court, uses the recording in an attempt to discredit and embarrass the witness. Especially in light of Model Rule 3.4(a), prohibiting a lawyer from obstructing another party's access to evidence,<sup>50</sup> it is doubtful that the proposed Standard is accomplishing its goal of allowing prosecutors to protect the neediest of victims and witnesses from abuse without unduly obstructing defense counsel from uncovering relevant facts and information. In fact, as drafted, the proposed Standard seems to be in tension with Model Rule 3.4(a).

Even if the proposed Standard is intended to permit a prosecutor to share this type of cautionary information—presuming the information is true, of course—should the Standard apply equally to victim and

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48. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.1(d) (Proposed Revisions 2010).

49. *Id.*

50. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2010).

nonvictim witnesses? In many instances, the prosecution contacts—and therefore potentially influences—nonvictim witnesses long before the defense knows their identities. Because neither the proposed Standard nor the Investigation Standards differentiates between victim and nonvictim witnesses, prosecutors will be left to decide these issues from the perspective of an adversary who is usually convinced that the defendant is guilty and that justice demands conviction and, correspondingly, protection of the case, the witnesses, and, in particular, the victims. Without doubt, these inherent pro-prosecution biases will lead prosecutors to warn witnesses to avoid unnecessary contact with the defense. If the drafters of the Standard intend to foster more communication between witnesses and the defense, the proposed Standard should be modified to reflect that goal. If the Standard is intended to permit prosecutors to exercise extensive discretion, then it should say so expressly. There are meritorious arguments for either policy decision. Certainly, with clear boundaries in the Standard, prosecutors could be expected to inform witnesses about the system and their role in it, allowing witnesses to understand the importance of taking interviews seriously, and speaking honestly and carefully whenever they talk with counsel for either side. However, without taking a specific position on this issue, the Standard leaves prosecutors to guess about the best course of action, resulting, at a minimum, in inconsistent treatment of witnesses and in unpredictability for defendants regarding how much access they will have to witnesses.

Proposed Standard 3-3.5, which addresses a prosecutor's "relationship" with victims and witnesses, also implies that a prosecutor holds extensive discretion to insulate a victim or witness from defense counsel or from anyone else, if the witness "may need" such protection.<sup>51</sup> On this point, proposed Standard 3-3.5(k) says: "The prosecutor should seek to ensure that victims and witnesses who may need protection against intimidation or retaliation are advised of and afforded protections where feasible."<sup>52</sup> The words "intimidation" and "retaliation" are left undefined. Thus, a prosecutor could reasonably interpret "intimidation" to include probing pretrial interviews by defense counsel or could give the word some other expansive interpretation. Likewise, prosecutors may interpret "retaliation" very broadly.

Because victims, by definition, have been exploited by someone whom they believe to be the defendant, they regularly ask prosecutors how to protect themselves from further victimization. Victims often perceive the prosecutor as their champion. Especially when a case is

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51. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.5(k) (Proposed Revisions 2010).

52. *Id.*



complex or a victim particularly vulnerable and integral to the prosecution, a prosecutor can spend significant time meeting with the victim and preparing her to testify. From the victim's perspective, such repeated interaction suggests that the prosecutor represents the victim and shares the victim's interests. Of course, as the Investigation Standards make express, the prosecutor represents "the public," not individuals.<sup>53</sup> Nevertheless, because victims look to prosecutors for guidance, they commonly express fear of a defendant and convey a desire to avoid any nonessential interaction with either the defendant or her lawyer.<sup>54</sup>

Because the proposed Standard leaves prosecutors unilaterally to interpret the words "intimidation" and "retaliation," it gives prosecutors leeway to take an excessively protective posture and thereby discourage important witness-defense communications in many routine cases. For example, the prosecutor might decide that a majority of witnesses are sensitive and, therefore, subject to undue influence from opposing counsel. What is to prevent her from telling all of these witnesses: "It is unwise to talk to defense counsel or anyone who represents the interests of the defendant. Anything you tell the defense may reach the defendant, even your address, phone number, or other personal and identifying information. You could jeopardize the case and your personal safety." Another prosecutor might similarly tell witnesses: "You have the right to talk to defense counsel. Just understand, if you want to stay safe and assure that the defendant is convicted, your best strategy is to avoid all contact with the defendant, her lawyer, her lawyer's investigator, and the defendant's family and friends." If prosecutors can and do speak in these terms, the defense will enjoy significantly less access to witnesses.

Such admonitions are, no doubt, warranted in a few unusual cases, for example, those with extremely dangerous defendants who have a history of threatening witnesses, but there is no reason for similar cautions in run-of-the-mill cases. When a witness shows no indication of vulnerability to intimidation and a defendant shows no inclination to intimidate or threaten witnesses, a prosecutor should permit the defense access. One ethics opinion from Colorado goes further and suggests that prosecutors should *encourage* witness-defense communications, explaining that prosecutors should tell witnesses that while they are under no obligation to do so, the interests of justice favor making themselves available to the defense.<sup>55</sup> While the Colorado opinion arguably goes too

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53. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.2(b) (2008); *see also* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(b) (Proposed Revisions 2010) ("The prosecutor's client is the public . . . not particular government agencies, witnesses, or victims.").

54. This observation also rests on my own observations when I was prosecuting cases.

55. Ethics Comm. of Colo. Bar Ass'n, Formal Op. 65 (1984). In an essay exploring the tension "between the growing public concern for victims' rights and traditional concerns for the rights of an

far the other way, the Standards should confine prosecutors' discretion by defining "intimidation" and "retaliation" so that such warnings to witnesses hinge on some evidence that the defendant will try to discourage a witness from testifying or to alter the substance of the witness's truthful testimony.

As discussed briefly in Part I, cognitive biases, which tend to make us protective of those within our inner circle and to predispose us to ideas we form early in our decisionmaking process, will tend to lead all prosecutors to urge witnesses not to share information with the defense, especially given that prosecutors are also zealous advocates seeking to "win" a conviction. Therefore, if the Standards intend to give defense counsel equal or similar access to witnesses, then the proposed Standards should provide more restrictive direction about how an ethical and professional prosecutor responds to these dilemmas. Prosecutors need express guidance regarding when they may caution witnesses about talking to the defense, whether they must treat nonvictim witnesses differently than they treat victims, and what restraint, if any, they must observe when protecting vulnerable witnesses from intimidation. Such guidance will necessarily reduce the influence of bias that affects discretionary decisions and may prevent those prosecutors who engage in intentional prosecutorial misconduct from successfully claiming ignorance or a good-faith mistake.

Presuming that the Standards can be crafted to effectively guide prosecutors, should defense counsel share similar duties when communicating with nondefendant witnesses? After all, the defense acts in conjunction with her own set of cognitive and social biases; yet, the defense fills a role quite distinct from that of the prosecutor.

## 2. *The Defense Function Standard*

The proposal for the Defense Function Standards on the subject of talking with witnesses about opposing counsel is still undergoing significant study and revision by the ABA Criminal Justice Section. It, nevertheless, differs substantially from the proposed Prosecution Function Standards. Proposed Standard 4-4.4(e) currently reads: "Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor."<sup>56</sup> In other words, the

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accused," David Caudill cites this ethics opinion, which informs prosecutors that if asked whether a witness should submit to an interview by defense counsel, prosecutors should inform the witness that "it is in the interest of justice that the witness be available for interview by counsel." David S. Caudill, *Professional Deregulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victims' Rights*, 17 GEO. J. LEGAL ETHICS 103, 103, 115 (2003) (emphasis omitted).

56. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.4(e) (Proposed Revisions 2009). The proposed Standard makes an exception for communication between defense counsel and the defendant. "Defense counsel should not advise any person *other than a client*, or cause such person to be advised, to decline to give to the prosecutor or defense counsel for codefendants information which

proposal for the defense is the equivalent of current Standard 3-3.1(d) for prosecutors. As discussed above, unlike current Standard 3-3.1(d), the proposed Prosecution Function Standard permits prosecutors to discourage some witnesses from talking to the defense.<sup>57</sup>

The proposed Defense Function Standard tacitly recognizes that prosecutors and defense lawyers play different roles in the criminal justice process and that different standards and expectations are, therefore, appropriate. The prosecutor's objective should be justice; defense counsel's goal is freedom for the accused. A prosecutor's role as "minister of justice" demands that she seek an accurate result regardless of who wins the case and that she protect victims from additional harm.<sup>58</sup> Perhaps, due to their unique role, prosecutors are expected to be more inclined than the defense to gather information from witnesses without trying to gain an advantage in the case and to recognize when justice demands that the defense have access to witnesses.<sup>59</sup> The defense's role of zealous advocacy never demands even-handed presentations of fact and imposes no special obligation to witnesses. Because defense counsel is duty bound to the defendant, even at the cost of embarrassing or pressuring some witnesses, many defense lawyers affect witness testimony differently than prosecutors do. While the defense seeks to unearth any fact that may exonerate the defendant or help to reduce her sentence, the prosecution—at least in theory—wants to ensure that a witness is credible and that the system protects the witness's ability to tell her truthful story. Because their responsibilities are different, there are persuasive reasons to allow prosecutors to exercise some discretion and to advise some vulnerable witnesses about whether or not to talk with the defense, but to prohibit defense lawyers from discouraging conversations with the prosecution.

Many defense lawyers may, nevertheless, object to uneven treatment in the Standards, especially on the subject of lawyer communications with nonvictim witnesses. Defense lawyers, just like prosecutors, are officers of the court, owing the court a duty of candor.<sup>60</sup> Each is an advocate, duty bound by all of the respective ethical rules in

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such person has a right to give." *Id.* (emphasis added). The proposal is virtually identical to the current Prosecution Function Standard, which has been revised substantially in the proposed amendments. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1(d) (3d ed. 1993).

57. See *supra* Part II.A.1.

58. See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1362 (2011) (explaining that prosecutors have a special "duty to seek justice, not merely convict"); *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that prosecutors owe a duty of justice).

59. This was generally my own observation as a prosecutor. Admittedly, my faith in most prosecutors and skepticism for some defense lawyers may be explained by "ingroup bias," which "designates favoritism toward groups to which one belongs" and necessarily implies a relative negativity toward a complementary out group. See Greenwald & Krieger, *supra* note 22, at 951–52.

60. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010) (requiring candor to the tribunal).

her jurisdiction. With the imposition of different standards, the prosecution gains at least some competitive advantage over ethical and professional defense counsel. Furthermore, one can imagine circumstances in which defense counsel would advance justice by discouraging a witness from talking openly with the prosecution or to a codefendant's lawyer. For instance, the defense may learn that a hard-to-find eyewitness can offer favorable testimony for the defendant but is scared to come forward because of possible immigration consequences or potential retaliation. Under such limited circumstances, where the witness is needed for an accurate trial outcome, one that might exonerate the defendant, perhaps the defense should have a limited right to discourage these witnesses from volunteering information to opposing lawyers in the case. Furthermore, members of the defense bar could point to anecdotal evidence of prosecutors mishandling witnesses. Several such incidents are noted at the start of this Article.<sup>61</sup> Thus, there are compelling reasons to believe that some prosecutors as well as some defense lawyers attempt to influence witnesses unfairly and to infect other relevant evidence.

In fact, because prosecutors and the defense regularly meet with witnesses without opposing counsel present,<sup>62</sup> all lawyer-witness communications potentially influence witness testimony in fundamental ways that cannot be offset later when opposing counsel has a chance to talk with, or to cross-examine, the witness in the presence of a judge or jury. When lawyers meet with witnesses to prepare them to testify, they may not document the witness's statements, let alone the advice they give to the witness.<sup>63</sup> Because so much is at stake in criminal cases, there are convincing reasons to encourage transparency in the entire witness preparation process. Although customary discovery practices in criminal cases do not demand such transparency, the Criminal Justice Standards for Prosecution and Defense Functions can create an influential check on an advocate's intended or inadvertent tainting of witness testimony. The Standards might outline a best-practices approach that permits both the

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61. See *supra* notes 6–15 and accompanying text.

62. Although practices differ by jurisdiction, many do not regularly use depositions, which are customary in civil cases.

63. When I was a federal prosecutor, this topic was often debated. The general advice was to avoid taking notes so that the prosecutor avoids creating evidence of a witness's inconsistent statements. The Jencks Act generally requires production to the defense of witness "statements" in the government's possession following a witness's testimony. 18 U.S.C. § 3500 (2006). For purposes of the Jencks Act, a statement is one adopted by the witness, a substantially verbatim recital of an oral statement by the witness, or a witness's statement before the grand jury. See *id.* § 3500(e). Of course, documented or not, inconsistent statements may constitute *Brady* information that should be produced to the defense. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (withholding evidence of witness credibility when it may be determinative of guilt may violate *Brady*); see also *United States v. Campos*, No. 92-4573, 1994 WL 144866, at \*13 (5th Cir. Apr. 14, 1994) (not selected for publication) (indicating that prior inconsistent statements can violate *Brady*).

prosecution and the defense to tell witnesses (1) that opposing counsel or their agents will likely contact the witness; (2) that the witness should be careful to ask which side—defense or prosecution—the lawyer or agent represents; and (3) that while under no obligation to do so, a witness should feel free to talk candidly and honestly with opposing counsel but should also speak carefully, because everything said to either lawyer will likely be documented either in writing or in a recording and may be repeated later in court. The Standards could also recommend that both the prosecution and the defense avoid any communication with a witness that is likely to impact the substance of the witness's potential testimony. The Standards could provide a very limited right for defense counsel to protect important but vulnerable witnesses and a more expansive right for the prosecution to protect witnesses from intimidation. In other words, a separate Standard, beyond that contained in the Investigation Standards, is warranted for both the prosecution and for the defense. The Prosecution Function Standards should allow more protection for victims than other witnesses; they should also allow prosecutors limited discretion to protect any witness from intimidation or threats, and the Standards for both the prosecution and the defense should be clearer and more detailed.

#### B. COMMUNICATING WARNINGS TO WITNESSES

This subpart explores the need for prosecutors and criminal defense lawyers to warn a noncustodial witness of her constitutional protection from compelled self-incrimination and, relatedly, considers whether these lawyers should provide other admonitions if a witness begins to reveal privileged communications. Neither prosecutors nor defense lawyers are legally obligated to inform noncustodial witnesses of Fifth Amendment rights or evidentiary privileges. The question remains whether the Standards should promote more protection for witnesses than the law demands. Additionally, a witness may sometimes perceive a prosecutor's warning about self-incrimination as a subtle threat instead of a cautionary protection. This subpart considers the Standards' regulation of those subtle threats too.

##### 1. *The Prosecution Function Standard*

Proposed Standard 3-3.5(e) provides that prosecutors "should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel *whenever the law so requires*."<sup>64</sup>

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64. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.5(e) (Proposed Revisions 2010) (emphasis added). In full, proposed Standard 3-3.5(e) states:

A prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. A prosecutor should also consider so advising a witness if the prosecutor reasonably believes

Likewise, “[a] prosecutor should also *consider* so advising a witness if the prosecutor reasonably believes the witness may provide self-incriminating information and the witness appears not to know his or her rights.”<sup>65</sup>

The proposed Standard provides no protection beyond what the law already demands from prosecutors. Thus, it lacks an aspirational component. Presumably, the “whenever the law so requires” language refers to the Supreme Court’s general pronouncement that a statement may not be introduced in a prosecutor’s case-in-chief if the statement is obtained in violation of the dictates of *Miranda v. Arizona*,<sup>66</sup> or in breach of the Fifth Amendment guarantee against compelled self-incrimination.<sup>67</sup> But the language could hardly be more conceptual. If the drafters mean that prosecutors should warn all persons subject to “custodial interrogation,” then that is what the proposed Standard should say. If the proposed Standard is intended to be more restrictive or inclusive, then it should say so expressly. Indeed, if the drafters believe that prosecutors should err on the side of warning witnesses who may incriminate themselves, telling prosecutors that they should also “consider” giving such warnings is excessively permissive. If the Standard is meant to require prosecutors to tell witnesses that they have no obligation to talk, that their statements can be used against them in subsequent criminal proceedings, and that they may consult counsel before talking, then the Standard should say that directly.

Discussions in the roundtable sessions underscored a need for the Standards to state their expectations expressly. In both Florida and Ohio, prosecutors were adamantly opposed to a Standard that required them to warn witnesses when the law does not require such warnings. In contrast, in Rhode Island, prosecutors believed that such a Standard was unnecessary because of common practice. In Rhode Island, it is customary for prosecutors to advise all witnesses who appear before a grand jury of their rights against self-incrimination. In the view of prosecutors there, a Standard on the subject would be gratuitous and superfluous. Nevertheless, even in Rhode Island, there are noncustodial situations beyond the grand jury room in which prosecutors will interview witnesses who are likely to incriminate themselves. Therefore,

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the witness may provide self-incriminating information and the witness appears not to know his or her rights. However, a prosecutor should not exaggerate the potential criminal liability of a witness, or so advise a witness, with a purpose, or in a manner likely, to intimidate or influence the truthfulness or completeness of the witness’s testimony or to unfairly alter the witness’s decision whether to provide information.

*Id.*

65. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.5(e) (Proposed Revisions 2010) (emphasis added).

66. 384 U.S. 436 (1966).

67. *See* U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself . . .”).

customary practice does not dictate how prosecutors there will handle those witnesses and whether they should err on the side of providing a warning, decide on a case-by-case basis, leave each decision to the discretion of the individual prosecutor, or comply with the law without more.

If we want witnesses across the country to receive consistent treatment from prosecutors, then the proposed Standards should indicate best practices regarding when prosecutors should warn witnesses. If the prevailing view is that witnesses deserve no warnings beyond what the law requires, then proposed Standard 3-3.5(e) should be deleted, because it adds no value. Yet, its presence suggests that the Standards encourage some behavior beyond the legal mandates. The Standards are neither binding nor obligatory; thus, if this Standard merely restates the current law, why bother having a Standard on this subject?

Accepting that some Standard should address this important and recurring issue, it is necessary to determine the appropriate extent of protection such a Standard should provide. The Standards could tell prosecutors to advise all witnesses in the grand jury, all witnesses whom prosecutors believe may incriminate themselves, or require such warnings only if a witness asks about her rights. As noted, there is disagreement across jurisdictions about how prosecutors *should* act. A case can be made that prosecutors should remind all witnesses of their rights against self-incrimination before interviewing them, especially considering that prosecutors hold extensive power and may be perceived by the typical witness as exceptionally intimidating. Also, bright-line directions are easy to understand and to follow. Such a rule would help to ensure that witnesses understand the gravity of their statements and that they are speaking voluntarily, underscoring that they have no obligation to talk if they prefer to remain silent. On the other hand, such warnings may discourage some witnesses from sharing relevant information that may increase accurate trial outcomes and prompt fair plea agreements. Whatever the drafters decide, the current proposal should be modified for clarity and force.

Even beyond self-incrimination warnings, a persuasive case can be made that prosecutors, who are tasked with seeking justice, should respect other important interests of a witness, such as evidentiary privileges. Imagine that a prosecutor begins an interview with innocuous questions, eliciting background information from a witness about a crime and, in response, a witness begins to share privileged marital communications or protected attorney-client communications. Should a prosecutor interrupt the witness, discuss the privilege, and ensure that the witness understands that by revealing the communications, she is probably waiving the protection? Or should the witness answer at her own risk? The law provides no protection for witnesses who ignorantly

waive privileges, but prosecutors preying on witness ignorance smacks of gamesmanship and power imbalance, not fair play. If prosecutors are ministers of justice, then they arguably should deal with witnesses at a level well above the legal mandates and behave in ways that create respect and admiration for prosecutors' just treatment of all persons touched by the criminal justice system, particularly witnesses and victims who are usually unintended participants in the process. Despite good reasons for prosecutors to protect witnesses from inadvertent waivers, in all three roundtable meetings, discussants believed that witnesses should bear the burden of asserting privileges and that the Standards should not impose any obligation on the prosecutor to protect such communications.<sup>68</sup> Even if protection for privilege lacks support from a majority of practitioners in the regions I visited, the Standards should, nevertheless, protect these communications. A Standard that demands an exceedingly high level of professionalism for witness interactions and that fosters the rights of witnesses is an appropriate goal for aspirational standards such as these. Standards, after all, are designed to provide guidance for optimal, not merely ethical, lawyer behaviors.

In addition to providing only vague guidance on when to warn witnesses of the right to counsel and the right against compelled self-incrimination, proposed Standard 3-3.5(e) tells prosecutors that they "should not exaggerate the potential criminal liability of a witness, or so advise a witness, with a purpose, or in a manner likely, to intimidate or influence the truthfulness or completeness of the witness's testimony or to unfairly alter the witness's decision whether to provide information."<sup>69</sup> This portion of proposed Standard 3-3.5(e) is certainly directed at unsavory threats and intimidation that might change a witness's testimony or even her willingness to talk or to testify. The need for such a Standard is demonstrated by the *Broadcom* and *Golding* cases referenced at the beginning of this Article.<sup>70</sup> Although discouraging intimidating communications directed at potential witnesses is undoubtedly a laudable goal, this provision creates tension with another provision within the same Standard that encourages prosecutors to "consider" advising a witness if the prosecutor reasonably believes the witness may provide self-incriminating information.<sup>71</sup> A prosecutor can use a self-incrimination warning in a good-faith effort to protect a witness's interests, but also as a sword to suggest that the witness is subject to criminal prosecution. The Standards should explain where the

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68. See *supra* note 16.

69. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.5(e) (Proposed Revisions 2010).

70. See *supra* text accompanying notes 12–13.

71. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.5(e) (Proposed Revisions 2010).



line falls between appropriate and inappropriate self-incrimination warnings, or at least acknowledge that self-incrimination cautions sometimes go too far and constitute threats.

In addition to creating some internal conflict, proposed Standard 3-3.5(e) extends to warnings implicating potential *criminal* liability but overlooks other types of similar “warnings.”<sup>72</sup> The Standards should extend to communications that use criminal or noncriminal adverse consequences to deter witnesses’ truthful testimony. The current proposal permits a prosecutor to insinuate or say—presuming the information is truthful—that by coming forward to testify for the defense, the witness risks becoming visible to the Internal Revenue Service for her questionable tax practices, or that admitting, in the course of her testimony, to operating a child care business out of her home could subject the witness’s business to closure for violation of a local ordinance.<sup>73</sup> Seemingly, the spirit of the proposed Standard would reach this “advice,” but the wording of the proposal has restricted the Standard’s coverage to potential *criminal* liability. The Standards should be broadened to cover both explicit and implicit threats designed to influence any witness’s testimony.

Whether or not proposed Standard 3-3.5(e) reaches (or should reach) other intimidating “warnings,” the language does not provide as much meaningful advice to prosecutors as it should. It plainly tells prosecutors not to try to change a witness’s testimony, but adds the tentative words, “in a manner likely, to intimidate or influence” the witness.<sup>74</sup> Is the prosecutor expected to predict the witness’s sensitivity to the prosecutor’s influence, or is this an objective, “reasonable person” standard? The Standards could effectively adopt a totality of the circumstances, reasonable person in the witness’s situation, test. But whatever the test, the drafters should include it expressly. Furthermore, the proposed Standard fails to explain what it means to “unfairly” alter a witness’s decision to provide information. Because the proposed Standard is silent on these points, prosecutors, who are naturally predisposed to believe that the defendant is guilty—and that witnesses have important evidence of that guilt—will tend to press witnesses to provide testimony favorable to the government’s case. This sort of influence, intentional or inadvertent, does not always promote justice.<sup>75</sup>

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72. *Id.*

73. *See id.*

74. *Id.*

75. *See* discussion *supra* intro. (discussing several cases in which witness testimony was seemingly tainted by pretrial communications).

## 2. *The Defense Function Standard*

Proposed Defense Function Standard 4-4.4(d) tells the defense that “[i]t is not necessary for defense counsel or defense counsel’s investigator . . . to caution . . . witness[es] concerning possible self-incrimination and the need for counsel.”<sup>76</sup> Although proposed Standard 4-4.4(d) never requires a defense lawyer to advise a witness of her Fifth Amendment rights, from the witness’s viewpoint, an incriminating statement may be detrimental regardless of whether it is elicited by the prosecution or the defense. Furthermore, if the witness’s potential testimony is adverse to the defense, the defense may be motivated to try to obtain harmful admissions and to pass them along to the prosecution. Because our system often hinges on civilian witness participation, a persuasive argument can be made for adopting a Standard that favors such warnings for both prosecution and defense, at least when the lawyers have reason to believe a witness is likely to incriminate herself. Providing extensive protections for witnesses will tend to promote open and honest witness participation. Of course, the Fifth Amendment privilege and the protections of *Miranda* do not apply to nongovernmental action, so there is no *legal* obligation on defense counsel to warn a witness of possible incrimination.<sup>77</sup> However, the absence of a legal obligation does not foreclose a different practice as a matter of ethics and professionalism.

Despite my reservations about absolving the defense from concern for a witness’s self-incrimination, in all three jurisdictions I visited during roundtable discussions, judges and practitioners agreed that defense lawyers should bear no responsibility to warn witnesses about self-incrimination and, thus, the proposed Standard is appropriate as written. The participants were satisfied that witnesses were not prevented from asserting their rights. Perhaps their position was not surprising, given that most participants did not favor prosecutors providing warnings beyond those the law demands. Nevertheless, the Standards should not reflect the majority position or even the ethical floor. They should provide guidance for those lawyers seeking to practice at the professional peak. As the implementation of *Miranda* for custodial suspects has shown, advising witnesses of their rights against self-incrimination is unlikely to significantly impair fact gathering.<sup>78</sup> At the same time, advice regarding Fifth Amendment rights would protect witnesses against inequitable

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76. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.4(d) (Proposed Revisions 2009).

77. See *United States v. Sanchez*, 614 F.3d 876, 886 (8th Cir. 2010) (holding that the constraints of the Fifth Amendment do not apply to purely private activity).

78. See Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 27 (2010) (discussing various studies and theories on *Miranda*’s impact on lost confessions, and stating that only a relatively small number of confessions are lost because of the decision).

treatment that often results from socioeconomic status, race, or cognitive lawyer bias.<sup>79</sup>

Related to a lawyer's duty to warn a witness of potential self-incrimination are the ethical issues that arise when defense counsel prefers that a witness invoke her Fifth Amendment right to silence in the face of a prosecutor's request for an interview or in response to questions posed during a hearing or trial. If defense counsel interviews a witness and learns that the witness's testimony will implicate the witness as well as the defendant, is defense counsel free to advise the witness to invoke her Fifth Amendment privilege? In 1991, Bruce Green posed this question in his article *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law* and concluded that "the ethical codes fail to speak clearly to the question."<sup>80</sup> Although the Model Rules might be interpreted to prevent such "advice,"<sup>81</sup> the proposed Standards do not speak to the topic. The Standards should remove this ambiguity so that defense counsel is not left to guess about whether she is permitted to urge invocation. The ambiguity in the Model Rules provides an opportunity for the Standards to supply helpful clarification about when, if ever, defense counsel can advise on invocation. For instance, the Standards might clarify that defense counsel is prohibited from advising nonclient witnesses to invoke the right.

Even if defense counsel bears no duty to advise a witness about her right against self-incrimination, should defense counsel be encouraged to respect other privileges held—maybe unknowingly—by a witness, such as the attorney-client or the penitent-clergy privilege? Participants of the roundtable discussions thought that witnesses should operate at their own risk in asserting or waiving privileges, regardless of whether they were interviewed by the prosecution or by the defense. But for the same reasons that prosecutors should respect witnesses' rights and thereby encourage witness participation in the criminal justice process, there are system-integrity reasons to draft a standard for defense counsel that urges them to honor witnesses' privileged communications. If lawyers are to be trusted so that witnesses will feel comfortable talking unguardedly with them, all lawyers must treat witnesses with respect. Arguably, such respect would include acknowledging a witness's privileges and, conversely, not capitalizing on a witness's ignorance of her legal rights.

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79. See, e.g., Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 72–74 (2011) (highlighting data and the lack of data on why poor people are overrepresented in the criminal justice system); Michael Mello, *Ivon Stanley and James Adams' America: Vectors of Racism in Capital Punishment*, 43 CRIM. L. BULL. 636, 652 n.101 (2007) (detailing some of the extensive literature on race and capital punishment).

80. Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 691, 698 (1991).

81. See MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010).

Having considered the proposed Standards' stance on communications about opposing counsel and warnings to witnesses, this Article now turns to lawyers' communications with experts.

### C. COMMUNICATING WITH EXPERT WITNESSES

As science and technology have advanced and become a prevalent part of hearings and trials, the need for expert witnesses has swelled, requiring prosecutors and the defense to meet with and prepare these witnesses frequently.<sup>82</sup> The more frequent the interactions, the greater the need for guidance on the boundaries for such meetings and communications. This subpart looks first at the proposed Standards for prosecutors before addressing the similar proposed Standard for the defense.

#### 1. *The Prosecution Function Standard*

Proposed Standard 3-3.6 addresses a prosecutor's "relationship" with expert witnesses and greatly expands, both in length and coverage, the reach of current Standard 3-3.3, entitled "Relations with Expert Witnesses." The current Standard speaks to two broad topics: (1) the need for prosecutors to respect the independence of experts, and (2) the impropriety of paying experts an "excessive" fee.<sup>83</sup> In contrast to the brief and targeted current Standard, the proposed Standard is highly detailed, lengthy, and urges due diligence in multiple aspects of the prosecutor's communications. For example, the proposed Standard tells the prosecutor that she "should investigate the expert's credentials, relevant professional experience, and reputation in the field," as well as determine whether the witness's "particular theory, method, or conclusions" are scientifically accepted.<sup>84</sup> The proposed Standard further

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82. See, e.g., Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U. L. REV. 643, 669 n.123 (1992) (noting that the number of expert witnesses in one county of Illinois increased 1540%, from 188 to 3100, between 1974 and 1989); Renee A. Forinash, *Analyzing Scientific Evidence: From Validity to Reliability with a Two-Step Approach*, 24 ST. MARY'S L.J. 223, 251 (1992) (noting the importance of expert witness testimony in complex technical litigation).

83. Current Standard 3-3.3 says:

(a) A prosecutor who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, the prosecutor should explain to the expert his or her role in the trial as an impartial expert called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(b) A prosecutor should not pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert will give or the result in the case.

STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.3 (3d ed. 1993).

84. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.6(b) (Proposed Revisions 2010).

instructs that a prosecutor “should examine [the] testifying expert’s background and credentials” and should study the substantive area of the witness’s expertise “to enable effective preparation of the expert, as well as cross-examination of any defense expert on the relevant topic.”<sup>85</sup> Arguably, this level of detail is unnecessary for trial preparation issues in an adversarial system in which each side maintains robust incentives to find and present the most qualified and convincing experts.<sup>86</sup> In a competitive system, these are topics a prosecutor would typically investigate and consider before selecting an expert, but any weakness in an expert’s background, preparation, or methods would usually be exposed by defense counsel during cross-examination. Moreover, by covering so many topics in the Standard, the drafters have reduced the emphasis on the most important aspect: ensuring the dispassionate objectivity of the “expert” witness.

While extensive verbiage in proposed Standard 3-3.6 is devoted to prosecutors’ methods in selecting and preparing experts for trial, the proposal spends few words on maintaining the independence of these witnesses. Most directly, proposed Standard 3-3.6(d) tells the prosecutor that she “should explain to the expert that the expert’s role in the proceeding will be as an impartial witness called to aid the fact-finders,”<sup>87</sup> but this guidance is sandwiched among other advice about examining the expert’s background and credentials, and is included with instructions on other trial strategy topics. Paragraphs (f) and (g) within proposed Standard 3-3.6 also speak to objectivity. Paragraph (f) says: “The prosecutor should provide the expert with all information reasonably necessary to support a full and fair opinion.”<sup>88</sup> Paragraph (g) adds: “The prosecutor should timely disclose to the defense all evidence or information learned from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the prosecutor does not intend to call the expert as a witness.”<sup>89</sup>

Does the language “provide the expert with all information reasonably necessary to support a full and fair opinion”<sup>90</sup> require the disclosure of all adverse information or only adverse information that the prosecutor deems “material?” It is not unusual for the prosecution to present an expert witness with a series of facts expressing only the victims’ version of events without mentioning the defendant’s conflicting

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85. *Id.* § 3-3.6(d).

86. The proposed Standard parallels in many respects the “*Daubert* standard,” which federal trial judges apply when deciding whether to permit expert scientific testimony. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

87. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.6(d) (Proposed Revisions 2010).

88. *Id.* § 3-3.6(f).

89. *Id.* § 3-3.6(g).

90. *Id.* § 3-3.6(f).

story. Especially in cases with competing evidence that hinge on witness credibility, should prosecutors be permitted to ask an expert to assume the truth only of statements made by the victim and other prosecution witnesses, thus presenting a one-sided fact scenario? Unfortunately, the proposed Standard is unclear about whether this practice would constitute an ethical violation. The proposed Standard should, therefore, be modified so that prosecutors know whether they are required to share with an expert evidence that conflicts with the prosecutor's theory of the case.

Paragraph (g) talks in terms of tendencies to negate guilt or to mitigate the offense.<sup>91</sup> Perhaps the language is designed to mirror the Supreme Court's definition of "*Brady* material," as famously announced in *Brady v. Maryland*.<sup>92</sup> However, the proposed Standard does not use the word "*Brady*" and, therefore, may require more or demand less than the *Brady* decision. In a prior draft, paragraph (g) said that prosecutors should disclose information from other experts "that [is] materially adverse to the prosecution's case."<sup>93</sup> Even in that version, the word "material" was undefined, leaving doubt about whether the drafters intended material to have the meaning assigned by the Supreme Court in *Kyles v. Whitley*,<sup>94</sup> or some other meaning. Should paragraph (g) contain a materiality requirement? The law does not require prosecutors to produce evidence merely because it has exculpatory value.<sup>95</sup> Such evidence must also create some reasonable chance of impacting the outcome of the case.<sup>96</sup> The Standard, which is aspirational by design, can and should reach beyond what the law requires. Especially in this particularly troubling area—involving *Brady* obligations<sup>97</sup> and potential violations that are sometimes uncovered fortuitously and often only years after a wrongful conviction<sup>98</sup>—in which prosecutors are often loath to produce too much information and, not uncommonly, err on the side of producing too little, the Standard should urge prosecutors to be more generous in producing documents and other evidence. Furthermore,

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91. *Id.* § 3-3.6(g).

92. 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment . . .").

93. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.3(g) (Proposed Revisions 2009).

94. 514 U.S. 419, 433–34 (1995) (finding evidence is material when it has "a reasonable probability" of changing the outcome of a trial).

95. *Id.* at 436–37.

96. *Id.* at 435.

97. For a discussion of the changes to the Standards for *Brady* disclosure obligations, see Ellen Yaroshfsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321 (2011).

98. See, for example, the case of Anthony Graves discussed *supra* notes 9–11 and accompanying text.

whatever their substantive requirements, the Standards should be apparent in their goals.

Even if proposed Standard 3-3.6 imposes a materiality requirement, it appears to permit crafty lawyering to avoid the creation of exculpatory information from an expert. As proposed, the Standard allows a prosecutor to tell a potential expert that the expert should review the file and determine whether she is able to opine *X*, but that if the expert finds that she is unable to offer opinion *X*, no further work need be done on the file, and no opinions need be articulated or shared. In this way, the prosecutor avoids the creation of any adverse opinions. If the proposed Standard is intended to deter this practice, its wording should be modified to make its objective unmistakable.

In any event, the proposed Standard should be edited to ensure an emphasis on maintaining objective experts who offer logical and rational opinions and to avoid covering so many minor details that the main thrust of the Standard becomes obscured.

## 2. *The Defense Function Standard*

Should defense counsel share the same obligations as prosecutors to ensure the independence and unbiased nature of an expert witness? Proposed Defense Function Standard 4-4.5 would seem to suggest yes, at least in large part.<sup>99</sup> As with the new proposal for prosecutors, proposed Standard 4-4.5 seeks to dictate how defense counsel interacts with experts at a micro level. To a large degree, it includes specifics comparable to those in the proposal for prosecutors, including a provision telling defense counsel that she “should respect the independence of the expert” and that she should explain to the expert that her role is “to aid the fact finders and not act as a partisan.”<sup>100</sup> As with the proposal for prosecutors, proposed Standard 4-4.5 also spends many paragraphs addressing due diligence and trial preparation issues.<sup>101</sup> On one hand, explicit guidance about the approach defense counsel should employ in evaluating and selecting experts may promote the effective assistance of counsel, urging all defense lawyers, especially novices, to exercise attention to every detail in selecting and preparing these influential witnesses. On the other hand, not every case demands the same degree of attention to experts. Assuming competent counsel,

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99. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.5 (Proposed Revisions 2009).

100. *Id.* § 4-4.5(c).

101. See, e.g., *id.* § 4-4.5(b) (“Before engaging an expert, defense counsel should investigate the expert’s credentials, relevant professional experience, and reputation in the field.”); *id.* § 4-4.5(c) (“Defense counsel should explain . . . the manner in which the examination of the expert witnesses is likely to be conducted, and suggest likely impeachment questions the expert may be asked.”); *id.* § 4-4.5(f) (“Defense counsel should . . . seek to learn enough about the substantive area of the expert’s expertise to enable effective preparation of the defense expert, as well as cross-examination of the government’s expert.”).

Standards that demand this level of concentration on expert witnesses may result in less attention to other equally (or more) important aspects of a given case. Perhaps the proposed Standards are too detailed, covering too many specifics and not enough major themes, such as impartiality and lawyer diligence. Nevertheless, a highly detailed Standard is more suited to the defense than to the prosecution. When defense counsel complies with a highly detailed Standard, clients and courts may be more readily satisfied that counsel has fulfilled her role to represent her client diligently.

Although the proposed Standard addressing experts has become too detailed in some ways, its emphasis on clarity is laudable, as clarity reduces the likelihood of judgment-clouding cognitive biases.

#### CONCLUSION

Prosecutors and defense counsel constantly interact with potential witnesses, including sensitive victims and savvy experts. This Article asks some questions and offers a few thoughts about the type and amount of guidance the ABA Criminal Justice Standards for Prosecution and Defense Functions should provide lawyers who communicate with these and other putative witnesses. It ultimately argues for clarity because plain standards will lessen unnecessary discretion and reduce the impact of individual lawyers' cognitive bias to which we are all vulnerable. Reducing ambiguity about the types of communications lawyers may and may not undertake with witnesses should result in more equitable treatment of witnesses and, thus, lead to a criminal justice system more worthy of confidence.