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THE PRESENTERS

Professor William H. Fortune
College of Law
University of Kentucky
Lexington, Kentucky 40506-0048

PROFESSOR WILLIAM H. FORTUNE is a 1964 graduate of the University of Kentucky. He practiced with the predecessor firm of Stites and Harbison for five years, joined the UK law school faculty in 1969 and has been there ever since, the last five years on a post-retirement appointment. He received a UK Great Teacher award, was UK ombudsman, chair of the University senate, and twice College of Law Associate Dean. He is a member of the UK College of Law Hall of Fame. On three occasions he took leaves of absence from the law school to work as a public defender in federal and state courts in California and Kentucky. Professor Fortune has taught legal ethics for 40 years, written numerous articles on ethics issues, and, with Rick Underwood, has written a book on Trial Ethics. He is a frequent speaker on legal ethics, including Kentucky Law Updates dating back to 1994. For his service to the Kentucky Bar Association over the years, he was honored with the Thomas B. Spain Award for Outstanding Service in Continuing Legal Education, the Service to Young Lawyers Award, and the Chief Justice’s Special Service Award. In 2015 Professor Fortune became chair of the Kentucky Bar Association Ethics Committee; he works with hotline lawyers and drafts ethics opinions for committee consideration.

Jane E. Graham
Henry, Watz, Raine & Marino, PLLC
401 West Main Street, Suite 314
Lexington, Kentucky 40507

JANE E. GRAHAM is an attorney with Henry, Watz, Raine & Marino, PLLC in Lexington where she focuses her practice in the areas of mediation and federal and state civil litigation. Ms. Graham received her A.B., magna cum laude, from Smith College and her J.D. from the University of Kentucky College of Law. She is a certified mediator with the Mediation Center of Kentucky and is a member of the Fayette County, Kentucky and Federal Bar Associations. She has served on the KBA Board of Governors, as a Trustee for the IOLTA Fund and currently serves on the Ethics Committee. Ms. Graham has received awards for contributions to law enforcement by agencies including the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service and others. She is a member of the University of Kentucky College of Law Hall of Fame.
THOMAS L. ROUSE maintains a private practice in Erlanger where he focuses his practice in the areas of ethics, professionalism, family law and civil litigation. He is also an adjunct professor with Salmon P. Chase College of Law and the Northern Kentucky University College of Business. He received his B.S., with Distinction, from the University of Virginia and his J.D. from the University of Kentucky College of Law. Mr. Rouse has served as president of the Kenton County (1985), Northern Kentucky (1989) and Kentucky Bar (2013-2014) Associations as well as director of Lawyers Mutual Insurance Company of Kentucky (2012-2015). He is a member of the Cincinnati and American Bar Associations, Association of Professional Responsibility Lawyers, American Association for Justice and the Kentucky Justice Association. Mr. Rouse served as mayor of Erlanger from 2007 to 2014.
I. WHAT IS "THE TRUTH?"

A. "Where does the truth lie? Not only is it impossible to always know, but it isn't even the defense lawyer's duty to know," Justice Cunningham concurring in *Brown v. Commonwealth*, 226 S.W.3d 74 at 87 (Ky. 2007).

B. Something (an event) happens and a person sees and encodes the event and later describes what the person believes he saw.

1. What was seen (perceived) and encoded? Factors:
   a. Degree of attention.
   b. Ability to perceive (vantage point, lighting etc.).
   c. Mindset (a cyclist and a driver will encode a bike/car accident differently).
   d. Purpose in encoding (gun focus).
   e. Gap filling (encoding what should have happened rather than what did happen).
   f. Interest/bias.
   g. The *Rashomon* effect on encoding and memory – *Rashomon* is a 1950 Japanese film directed by Akira Kurosawa in which four witnesses (including the deceased) describe a rape and murder in mutually contradictory ways.

2. What is recalled (encoded and able to be recalled) at the time the person describes what he believes he saw?
   a. Memory decay.
   b. Gap filling.
   c. Influences.

3. How does memory work and why does it fail? Scientists agree that memory is creative.

   As new bits of information are added into long-term memory the old memories are removed, replaced, crumpled up or shoved into corners. Little details are added, confusing elements are deleted, and a
coherent construction of the facts is created that may bear little resemblance to the actual event. Lotus, *Witness for the Defense*.

Scientists have proved how easy it is to implant a false memory, especially one that is plausible. In a well-known memory experiment, a researcher gave volunteers a booklet narrating three stories of events from their childhood along with an invented tale that described their getting lost in a mall at age five. When prompted later to write down all they could remember about the events, 25 percent were sure that all four had actually happened to them.

Spurred on by the controversy over recovered memory, other cognitive scientists found that false memory is a normal phenomenon. David Ruben, who studies autobiographical memory at Duke University, observed that adult twins often disagree over who experienced something in childhood. Each might believe, for example, that he was the one to get pushed off his bike by a neighbor at age eight. Apparently, the most basic facts about a past event (such as who experienced it) could be lost.

Even harrowing memories – the so-called flashbulb memories that feel as if they have been permanently seared into the brain – are not as accurate as we think. In 1992, a cargo plane crashed into an Amsterdam apartment building. Less than a year later, 55 percent of the Dutch population said they had watched the plane hit the building on TV. Many of them recalled specifics of the crash, such as the angle of descent, and could report whether or not the plane was on fire before it hit. But the event had not been caught on video. The "memory" shared by the majority was a hallucination, a convincing fiction pieced together out of descriptions and pictures of the event.

4. What does the narrator select to describe?

5. What words does the narrator select to describe what he believes he saw?

6. How are the words interpreted by the listener?

II. THE IMPORTANCE OF TELLING THE TRUTH

A. "Thou Shall Not Bear False Witness"

B. Perjury is a Crime and Facilitation of Perjury is both Unethical and Criminal

Imagine a society where word and gesture could never be counted on. Questions asked, answers given, information exchanged – all would be worthless. This is why some
level of truthfulness has always been seen as essential to human society. A society whose members were unable to distinguish truthful messages from deceptive ones would collapse. Bok, *Lying*, p. 18 (1978).

C. The Public does not Believe that Lawyers are Truthful

In a 2016 Gallup poll, on the qualities of honesty and truthfulness, the public rated lawyers: 3 percent very high, 15 percent high, 45 percent average, 27 percent low and 11 percent very low. You've heard the cynical joke:

Question: How do you know when a lawyer is lying?  
Answer: When his lips are moving.

This is unfair. With few exceptions lawyers are more truthful, more honest, than the clients they serve!

D. What Is a "Lie?"

Webster's primary definition is "an assertion of something known or believed to be untrue with intent to deceive." The secondary definition is "an untrue or inaccurate statement that may or may not be believed to be true."

The key, both legally and ethically, is intent to deceive. A statement that is false, but believed to be true, is not a lie.

E. Reckless Statements

Legally and ethically, is a statement of fact without a sound basis the equivalent of lying?

*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964): the plaintiff in a defamation case, if he or she is a public figure, must prove that the publisher of the statement knew that the statement was false or acted in reckless disregard of its truth or falsity.

Is there an ethical and legal difference between a reckless, but sincere, statement of fact and a statement of fact made without any belief in the matter? KRS 523.020 draws this distinction: in perjury prosecutions, a reckless statement is not a lie; a statement without any belief is a lie.

F. Johnny and His Mother

1. Fifteen year old Johnny is charged with burglarizing his neighbor's house at 11:00 p.m. The next day the police asked Johnny's mother, "Was Johnny home last night at 11:00?" She responded, "yes, he was here," believing he was asleep in his room. In fact he was out burglarizing the house next door. Did she lie?
2. Same facts, except that she said "yes, he was here," believing he was out burglarizing the house next door. In fact he was asleep in his room. Did she lie?

3. Same facts, except that she wasn't home at 11:00 but believed Johnny probably was home. Reckless?

4. Same facts, except that she wasn't home and, based on Johnny's behavior, didn't believe one way or the other. Equivalent of intent?

5. Same facts as (1) except that when asked if Johnny was home at 11:00, his mother replied, "He went to bed at 10:00 and he got up the next morning at 7:00." This is true but Johnny – as his mother knows – got up at 11:00 and went next door to burglarize the house, returning and going back to bed at midnight. Did she lie?

6. Assume the mother testifies as in (5). Did she commit perjury?

   The crime of perjury requires a material false statement under oath that is believed to be false – so perjury combines the dictionary definitions – the statement must be both false in fact and there must be intent to deceive.

7. To dissemble: give a false or misleading appearance to conceal the truth. There is a "literal truth" defense to perjury – one who intends to deceive but whose statement is literally true does not commit perjury.

   Q: Do you have any bank accounts in Swiss banks, Mr. Bronston?

   A: No.

   Q: Have you ever?

   A: The company had an account in Zurich for about six months.

   Bronston had maintained personal accounts in Switzerland for about five years but did not have an account when questioned. The Supreme Court reversed a perjury conviction because the non-responsive answer to the question was not literally false. Bronston v. United States, 409 U.S. 352 (1973).

8. In the original hypothetical the mother believed her fifteen year old son was home asleep at the time of the burglary. The attorney for the son knows this is not true because the boy confessed he committed the crime. Would it be ethical for a lawyer to call the mother to testify to what the mother believes is true but the lawyer knows is not true?
Rule 3.3(a): "A lawyer shall not knowingly. . . . (3) offer evidence that the lawyer knows to be false." The lawyer would be using an innocent person to present evidence the lawyer knows to be false. Not only would the lawyer be violating ethical rules, the lawyer would be committing perjury.

9. Is a lawyer ethically obligated to correct the testimony of a client or witness (the lawyer called to testify) that is dissembling – misleading but literally true?

The Model Rules 3.3(a) proscribes false statements and false evidence, which suggests that there is no obligation to correct misleading, but literally truthful, evidence. However, in discovery judges expect attorneys to act in good faith toward one another – no intentional misleading by secret constructions (depends on the meaning of "is") or literal truth. Civil Rule 37 equates evasive answers with a failure to respond. Should Rule 3.3(a) (the ethical rule) be similarly construed?

G. Lawyers, Lying and Rules of Conduct

1. Rule 3.3(a)(1) – "shall not knowingly: (1) make a false statement of act or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;" (A tribunal is an adjudicative body).

2. Rule 3.3(a)(2) – "shall not knowingly: . . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;"

3. Rule 3.3(a)(3) – "shall not knowingly: . . . (3) offer evidence that the lawyer knows to be false."

4. Rule 3.4(b) – "shall not: . . . (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;"

5. Rule 4.1 – "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

6. Rule 5.3(b) – "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer;"
7. Rule 8.4(a) – "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;"

8. Rule 8.4(c) – "It is professional misconduct for a lawyer to: . . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;"

H. Lying by the Lawyer

1. Question: Are all lies bad?

Lies that do not bear on the person's fitness as a lawyer should not be the subject of discipline. Some lies are virtuous – lying to save the life of an innocent person is the classic example; some ("white lies") are innocuous – for example, false praise for a spouse's appearance; some are serious but on private matters – lying to a spouse about an adulterous affair falls in this category. No one would seriously argue that any lie, no matter how innocuous, no matter how well-intentioned, subjects a lawyer to professional discipline. Everyone lies on occasion, and we would find it difficult, if not impossible, to function in a society in which everyone tells the truth at all times. Fortune, "Lawyers, Covert Activity and Choice of Evils," 32 Journal of the Legal Profession p. 5 (2008).

2. Are some lawyer lies in the course of representing a client permissible?

a. Negotiation. The comment to rule 4.1 is that "[u]nder generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of material fact" – such as a party's intentions as to an acceptable settlement. So, as in poker, bluffing is considered part of the game.

b. Necessity or choice of evils. What if the lawyer lies (or supervises a liar) because to lie is the only way to further a public good?

In re Paulter, 47 P.3d 1175 (Col. 2002) – prosecutor pretended to be a public defender to induce a murderer/kidnapper to surrender. Paulter had options. The court disciplined Paulter but the result might have been different if deception was the only way to secure the hostages' release.
On the other hand, the U.S. Supreme Court approved lawyer supervised "testers" in fair housing cases. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

The Fortune article above points out that many prosecutors supervise undercover operations in which deceit is required; the article opines that the Rules should legitimize attorney involvement in covert operations that serve the public good.

I. Interviewing a Client (or Witness) Who has an Incentive to Lie

For the lawyer who wants to stay on the right side of the line, consider the poker analogy. Ethical witness interviewing and preparation is straight poker – you are dealt the cards (the facts) and you play them as best you can. Unethical interviewing is draw poker – you discard the bad facts and ask for new ones. Many folks would consider the following as some indication of lying:

- Implausibility of the story
- Unexplained changes in the story
- An attempt to "get the story straight" with another's story
- Inconsistency with credible evidence
- Eye contact, body language, etc.

1. Does the guided interview create the lie?

Question: Does the lawyer want to hear what the person would choose to tell the lawyer without first educating the client about the law and the facts?


The attorney (A) interviews a client charged with murder. The client (D) stabbed the victim (V) in the course of a bar fight. D and V had previously argued, D left the bar, returned, resumed the argument; they started to fight and D stabbed and killed V.

The attorney (A) believes it would be helpful if D was carrying the knife when he was in the bar the first time.
1) A: Did you have the knife when you were in the bar the first time?

D: Why do you ask me that?

A: Never mind, just tell me.

D: Well no, I got it when I went back to the house.

2) A: Did you have the knife when you were in the bar the first time?

D: Why do you ask me that?

A: Because if you did it would show you didn't leave to get a weapon and then come back to hurt the guy.

D: Right, I had it with me the whole time.

3) A: Did you have the knife when you went in the bar the first time?

D: No, I got it when I went back to the house.

A: Now let's think about that. If you went home and got the knife, the prosecutor will say you went back to the bar to hurt the guy. That shows pre-meditation. If you were carrying the knife before the argument started, they couldn't say that.

D: No, you're right. I had it on me the whole time.

4) A: In this kind of a case, they'll say you left to get a knife and then came back to start a fight and hurt the guy. If you had the knife on you before the argument even started, they couldn't say that.

D: I had it with me the whole time.

At what point, if at all, did A cross the ethical line?

2. Is this one any different? Initial interview of a defendant in a criminal case.

A: Now, I want to hear your story but first let me tell you what I found out from the police report. The
bartender says that you came back in the bar and you started arguing with V – calling him names and all that. V was apparently just drinking beer and watching the tube at that point. But the bartender thinks V was the one who took the first swing and he thinks V had a beer bottle in his hand when you stabbed him. Does that sound about right?

3. How about giving the defendant a "Miranda" warning before the interview starts?

A: Now, this is a case in which they're going to say you went back in there to stab V because you were still mad at him for what he'd called you. I want to know what happened but you understand, you can't tell me that's what was going on and then testify to something else. I can't let you testify to something I know is false.

ABA Standard for the Defense Function 4-3.2. "Defense counsel should not instruct the client or intimate the client in any way that the client should not be candid in revealing facts so as to afford counsel free rein to take action which would be precluded by counsel's knowing of such facts."

"However, isn't the client entitled to know that the lawyer cannot ethically introduce false testimony before the client tells the story?" Modern Litigation Handbook at 533-34.

4. Inadvertently(?) improving the lie (unethical in both golf and law).

A: Look – they caught you with that brand new thirty-two inch TV that had been stolen in a burglary two days before. What's your explanation?

D: I found it.

A: You what?

D: I found it just sitting alongside the road.

A: And you thought somebody just decided to leave a brand new big TV alongside the road. Come on – no one's going to believe that. Where did you get it?

D: Well, okay. I bought it from a guy named Red. He told me it had been damaged in shipment and he sold it to me for $150.

A: Who is this Red?
D: Don't know his last name. I don't want to get him in trouble.

5. Here's a deliberate attempt to improve the lie.

_In re Foley_, 787 N.E.2d 561 (Mass. 2003). Sting operation in which an FBI agent allowed himself to be arrested for illegal possession of a gun and taped the meetings he had with attorney Foley. One of the tapes contained the following:

The respondent: "See the problem ... from the technical point of view is somehow distancing you from the gun. Which is why I asked about the car."

The agent: "It's a rental car. Hey I was out ... I, I stopped. I don't lock a car. What is this, it's not my car. What am I gonna lock it.... If I stopped a few places, you know what I'm sayin'?"

The respondent: "Yeah. That's not a problem. Those things there aren't the problem. What we have though is a situation where when they do find the gun, it's unloaded but they find the bullets in your pocket. So all they have to prove is that you knew the gun was there and you had dominion and control over it and that you...."

The agent: "Well can we think of a way that maybe ... the gun got in the car and ... ?"

The Respondent: "And that you didn't know what to do and were takin' the bullets out of it so that you could turn it over to the police. Yeah, but you gotta make somebody believe that one."

The agent: "Well I didn't say it would be easy."

The Respondent: "The thing is this. The...."

The agent: "See I was gonna bullshit ya when I came in. But I mean, you know, [the court officer] said you're you know ... a good guy and you can you know ... handle things like this. And I'm gonna tell ya straight. I mean I coulda said somethin' like ... hey my car's parked in the basement over at the Devonshire ... unlocked all the time. And I was out and I stopped at a light and BOOM it slides out from under the seat. What do I know from not. I thought it was a toy."
The Respondent: "That's fine except for the bullets. How do you get the bullets in your pocket?"

The agent: "Ahh ... I was a safe person? (laughter)"

J. When Do You "Know" Someone is Lying? "Reasonably Believe" Someone is Lying?

The Model Rules define "know" as "actual knowledge which may be inferred from the circumstances." Rule 3.3 (a) provides that a lawyer shall not offer evidence that the lawyer knows to be false, and provides that a lawyer may refuse to offer evidence that the lawyer reasonably believes to be false.

A defendant in a criminal case has a constitutional right to testify in his own behalf unless the defense lawyer knows that the testimony would be false. The Kentucky Supreme Court held that "know" in this context requires that the defense attorney have a "firm basis in objective fact" for concluding that the prospective testimony would be perjury. Brown v. Commonwealth, 226 S.W.3d 74, 84 (Ky. 2007). See also the Handbook at 535 – "beyond a reasonable doubt" standard.

Vince Aprile rejects an approach that requires the defense counsel to evaluate the client's story in light of other evidence. He argues that "courts should adopt the holding in State v. McDowell, 681 N.W.2d 500, 512 (Wis. 2004), that 'absent the most extraordinary circumstances' a defense attorney can only know his client will lie if the client explicitly tells him that he intends to do so:" It is not the defense attorney's job to compare the client's story to other evidence and decide the client is lying. Aprile, Client Perjury: When Do You Know the Client is Lying?, 19 Crim. Just. 14, 18 (2004).


With everyone other than the defendant in a criminal case, it's simple – you must refuse to offer the testimony.

With the criminal defendant it's anything but simple.

In Nix v. Whiteside, 475 U.S. 157 (1986), the United States Supreme Court affirmed a conviction in which defense counsel, by threatening to tell the judge, talked the defendant out of testifying falsely. Not surprisingly, the Court held that there is no constitutional right to testify falsely.

In Brown v. Commonwealth, 226 S.W.3d 74 (Ky. 2007), the Kentucky Court approved a procedure for defense counsel and judges who face this issue.
The facts of *Brown*: The defense counsel alerted the judge to the problem, the judge counseled the defendant against perjury and then allowed defense counsel to leave the room, returning after the conviction to represent the defendant at sentencing. The defendant testified by way of narrative and argued his own case (and the jury acquitted him on four of five counts).

The Court of Appeals affirmed and, on discretionary review, the Supreme Court reversed the conviction, Justice Scott dissenting. Why? Because the trial court had allowed the defense counsel to leave the room, meaning there was no one to protect the defendant from improper cross-examination.

This is the procedure the Court approved:

1. Defense counsel must try to persuade the defendant to testify truthfully or not at all.

2. That failing, defense counsel must disclose "material facts" to the judge as necessary to prevent a fraud (the perjured testimony) from occurring. SCR 3.130(3.3)(a)(3). The "material fact" that must be disclosed is that the client intends to testify falsely.

3. At this point the trial judge has the option of asking defense counsel for the facts that support the lawyer's belief (Justice Cunningham, concurring, would require this step). Or the judge may elect not to question defense counsel but rather to accept the lawyer's statement – with inquiry into the basis of the belief at a motion for new trial after conviction.

4. The judge must, however, "engage in a colloquy with the defendant about the importance of truthful testimony and lawyers' ethical responsibilities" to allow the defendant to reconsider.

5. The Court also approved the narrative approach. "It is also appropriate for the defendant to present the contested testimony in narrative form, in his attorney's presence, and with the attorney continuing to represent him by making appropriate objections on cross-examination on the portions of the testimony that she does not believe to be perjured. In this manner the defendant is always represented by counsel on matters for which he is entitled to be represented, not involving perjury." *Brown* at 84.

6. Though the Court said the procedure is "not exclusive," the Court also said "this is the approved approach to apply Rule 3.3 and Rule 1.6 without conflict." (226 S.W.3d at 85).

L. What Do You Do if You're Surprised by False Testimony?

You are "responsible" for your client and any witness you call to the stand. If you know the client or witness has offered material false
testimony, you are under an obligation to take remedial action. Rule 3.3(a)(3).

The false testimony must be material – there is no obligation to do anything if the false statements could not affect the outcome.

The proper procedure is:

1. Ask for a recess and urge the client or witness to correct the testimony.

2. If that does not produce the desired result, ask to talk to the judge (preferably in camera). Tell the judge the testimony is material and false, and include your basis for believing the testimony to be false, and follow the judge's directions. The client should be present during this exchange.

   Presumably the judge would at that point question the client or witness and decide what to do: nothing, directing you to follow the Brown procedure, or declaring a mistrial so you can be called as a witness in a retrial.

3. Resist being called as a witness. Assert the attorney client privilege to statements your client made that support your belief that the testimony was false. The crime fraud exception (KRE 503(d)(1)) applies if the client asked the attorney to present the false testimony.

M. In the case of a represented corporation, how is client defined for the purpose of requiring the corporation's attorney to take remedial action to correct material false testimony?

A possible answer: Comment [7] to Rule 4.2 (the no-contact rule) applies to supervisors and those whose acts might be imparted to the organization for purpose of liability in the case at bar. Hypothetical: Suit against corporation for injuries sustained in a traffic accident. Discovery depositions taken by plaintiff's counsel of the truck's driver and a passenger. Reading the rules together, the corporate attorney would be under a duty to correct material false testimony of the driver but not under a duty to correct material false testimony of the passenger.

N. Don't Counsel Your Client to Commit Perjury!

In re Attorney Disciplinary Matter, 98 F.3d 1082 (8th Cir. 1996). In a child custody case the attorney was surprised by a man's testimony that he had sex with the client in a motel while her child was lying in the adjacent bed. Unaware that the court tape system was live, the attorney woodshedded his client during a recess. The tape captured his subornation of perjury.
APPELLANT: Yeah, but I think the thing that hurts you is taking the kid in the room and screwing with the kid in the room. He said that you two had sex in the bed next to your kid, your little kid that was in the other bed. You're going to have to do something with it. (emphasis added)

D.G.: What can I do with it that won't make it seem like I'm lying? (emphasis added)

APPELLANT: I don't know. That's up to you. It could be your word against his. It's up to you. (emphasis added)

D.G.: Are you saying if I deny it then-(emphasis added)

APPELLANT: If you said it didn't happen, it didn't happen. (emphasis added)

O. Interviewing Hostile and Neutral Witnesses

"In interviewing witnesses it is prudent to assume that the witness will give a version of the events at a later time and that the attorney might become a necessary witness to challenge the turncoat. [T]he better view is that when impeachment is initiated by asking a witness whether he made a particular statement, the impeachment must be completed if the witness denies making the statement. Completion requires proof of the prior statement, which may necessitate the attorney testifying. 'To be sure, it might have been awkward for the lawyer to take the stand and testify, but if he was not prepared to do this even if it meant withdrawing from the case, he should not have asked the questions.' Jackson v. United States, 297 F.2d 195, 198 (D.C. Cir. 1961)."

To avoid this trap, a lawyer should either: 1) have someone else interview the witness; 2) have someone else present if the lawyer conducts the interview; or 3) have a recorded or written and signed statement from the witness. Modern Litigation Handbook at 179-80.

"Unless defense counsel is prepared to forego impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person." ABA Standard for the Defense 4-4.3(e).

In Holt v. Commonwealth, 219 S.W.3d 731 (Ky. 2007), the prosecutor cross-examined a turncoat witness with a series of "Didn't you tell me questions;" the witness denied the statements and the prosecutor did not complete the impeachment by taking the stand. The Supreme Court reversed the conviction, holding that, by the "Didn't you tell me questions," the prosecutor became an unsworn witness.