

# “WHOSE LINE IS IT ANYWAY?”: REDUCING WITNESS COACHING BY PROSECUTORS

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INTRODUCTION

In an ideal world, human memory would be infallible and immune to suggestibility by others; human beings would have the ability to remember and relay events exactly how they occurred. Unfortunately, this is not the case. Human memory is inherently flawed and is easily altered by outside influences.

A well-known scientific study by Elizabeth Loftus and John Palmer exemplifies the ability of an outsider to influence a witness’s account of an event through prompting.<sup>1</sup> In 1974, Loftus and Palmer showed a film of a car accident to participants who were then asked a series of questions about what they saw.<sup>2</sup> One of the questions was about the speed at which the two cars were traveling when the accident took place.<sup>3</sup> Each participant heard this question with one of five different verbs used to describe the accident.<sup>4</sup> Despite viewing the

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1. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 585–89 (1974).

2. *Id.* at 586.

3. *Id.* Specifically, participants were asked, “About how fast were the cars going when they [insert one of the five different verbs] each other?” *Id.*

4. *Id.* The verb used in the above question was one of the following: smashed, collided, bumped, hit, or contacted. *Id.* (“For example, some subjects were asked,

same footage, the participants' accounts of the event, as evidenced by their responses to the question, were influenced by the verbs the participants heard.<sup>5</sup>

Loftus and Palmer's scientific experiment, in addition to many subsequent studies,<sup>6</sup> demonstrates the ability to alter human memory by the use of minor suggestions. The detrimental effects of suggestibility on human memory are especially large in the criminal justice system, where a defendant's fate lies in the hands of the prosecutor handling his or her case. Prosecutors often rely heavily on what witnesses remember to achieve a guilty verdict.<sup>7</sup> As a result of human memory's fallibility and vulnerability to the power of suggestion, it is relatively easy for prosecutors to wrongly influence a witness's account of events through coaching, often without realizing they are doing so. While it is important for prosecutors to interview and prepare witnesses for their testimony at trial, it is crucial that they do not cross the line by coaching their witnesses. As a consequence of witness coaching by prosecutors, the criminal system's goal of seeking justice is obstructed. Not only has witness coaching resulted in wrongful convictions of innocent people, it also has inherently undermined the jus-

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'About how fast were the cars going when they hit each other?' while others were asked, 'About how fast were the cars going when they smashed into each other?').

5. *Id.* at 586–87. Specifically, findings showed that participants who were asked the question with the verb “smashed” answered with the highest speed, followed by participants with the verb “collided,” followed by “bumped,” followed by “hit.” Participants who were asked the question with the verb “contacted” answered with the lowest speed.

6. See Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 *LEARNING & MEMORY* 361, 361 (2005) (reviewing thirty years of scientific experiments on the “misinformation effect,” defined as “the impairment in memory for the past that arises after exposure to misleading information”); see also, e.g., Robert F. Belli, *Failure of Interpolated Tests in Inducing Memory Impairment with Final Modified Tests: Evidence Unfavorable to the Blocking Hypothesis*, 106 *AM. J. PSYCHOL.* 407, 413 (1993); Barbara Tversky & Michael Tuchin, *A Reconciliation of the Evidence on Eyewitness Testimony*, 118 *J. EXPERIMENTAL PSYCHOL.* 86, 86–91 (1989); cf. Laura L. Bowman & Maria S. Zaragoza, *Similarity of Encoding Context Does Not Influence Resistance to Memory Impairment Following Misinformation*, 102 *AM. J. PSYCHOL.* 249–64 (1989) (finding that misleading information does not lead to memory impairment if the original and misleading information are presented in similar contexts).

7. CHARLES J. BRAINERD & VALERIE F. REYNA, *THE SCIENCE OF FALSE MEMORY* 33 (2005) (“In legal cases, the guilt or innocence of defendants often turns on incidental details that are associated with crimes (Was it 11:30 p.m. or 11:45 p.m.? Was the temperature 65 degrees or 75 degrees? Did the robber have a tattoo on the left or the right forearm? Did the suspect touch the child on the back or on the buttocks?) rather than on the meaning of events, which is obvious to all concerned (i.e., a crime was committed).”).

tice-seeking function of the criminal justice system by undercutting a defendant's right to a fair trial.

This Note will address the blurred line separating conduct by prosecutors that constitutes proper witness prepping and conduct that constitutes improper witness coaching. It will go on propose reforms to mitigate damage caused by coaching, focusing in particular on prosecutors who act unknowingly. Section I.A will explain why witness prepping is a crucial process for prosecutors, and I.B will describe the four different gradations of witness coaching. Part II will discuss the science behind false memories and suggestibility, explaining why witness coaching is so detrimental (II.A), especially for certain vulnerable groups of people (II.B). It will then discuss factors incentivizing prosecutors to engage in witness coaching (II.C) and describe real-life effects of prosecutorial witness coaching (II.D). Part III will provide a layout of how ethics rules and case law handle this issue and will argue that existing guidance, safeguards, and sanctions are insufficient to prevent prosecutors from engaging in witness coaching. Section IV.A will discuss the proposal of a mandatory recording rule and will address the strengths and weaknesses of this reform. Finally, Section IV.B will describe new proposals for reform while focusing on options that will prevent prosecutors from unknowingly coaching their witnesses. This Part will go on to address how to handle witness testimony that may have been influenced by witness coaching.

## I.

### WITNESS PREPPING AND COACHING

#### A. *Why Allow Prosecutors to Prep Their Witnesses?*

“Witness prepping,” as will be used in this Note, refers to the proper interviewing and preparing of a witness by a prosecutor before trial. During this process, the prosecutor usually does the following:

discusses the witness's perception, recollection, and possible testimony about the events in question; reviews documents and other tangible items to refresh the witness's memory or to point out conflicts and inconsistencies with the witness's story; reveals other tangible or testimonial evidence to the witness to find out how it affects the witness's story; explains how the law applies to the events in question; reviews the factual context into which the witness's testimony will fit; discusses the role of the witness and effective courtroom demeanor; discusses probable lines of cross-

examination that the witness should be prepared to meet; [and] rehearses the witness's testimony, by role playing or other means.<sup>8</sup>

Witness prepping by prosecutors is considered an ethical practice; it would be unprofessional to not prepare a witness for his testimony before a trial.<sup>9</sup> Within the criminal justice system, witness prepping is an important and indispensable process that enables prosecutors to achieve their role of seeking justice.

Witness prepping begins at the early stages of a case when a prosecutor initially interviews a witness. It provides a prosecutor with information about the case that he or she is pursuing or deciding whether to pursue. The initial interviews with a witness allow a prosecutor to obtain facts about an event as well as assess the witness's memory of what occurred, which gives the prosecutor an idea of the potential testimony the witness might give at a future trial.<sup>10</sup> In the later stages of a case, witness prepping enables a prosecutor to refresh a witness's memory as to his prior statements and to address any inconsistencies or conflicts within a witness's account.<sup>11</sup>

Witness prepping also benefits the witness by allowing the prosecutor to explain how the legal process works. Witnesses are often not conversant in the workings of the legal system, and this can be intimidating. Witness prepping is valuable in that it enables a prosecutor to provide a witness with factual and legal context on how his or her testimony will likely influence the case and to explain how the applicable law pertains to the incident in question.<sup>12</sup> This provides a witness with a bigger picture, allowing him or her to better understand the case and the role his or her testimony will play. In addition, witness

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8. Richard C. Wydick, *The Ethics of Coaching*, 17 CARDOZO L. REV. 1, 4–5 (1995).

9. Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715, 776–77 (1998); see also *United States v. Rhynes*, 218 F.3d 310, 319 (4th Cir. 2000) (“Thorough preparation demands that an attorney interview and prepare witnesses before they testify. No competent lawyer would call a witness without appropriate and thorough pre-trial interviews and discussion. In fact, more than one lawyer has been punished, found ineffective, or even disbarred for incompetent representation that included failure to prepare or interview witnesses.”); *United States v. Tucker*, 716 F.2d 576, 583 (9th Cir. 1983) (finding defense counsel ineffective for lack of sufficient interviewing of witnesses in preparation for trial); *McQueen v. Swenson*, 498 F.2d 207, 216–18 (8th Cir. 1974) (same); *In re Wolfram*, 847 P.2d 94, 96 (Ariz. 1993) (allowing for the suspension of an attorney, partly due to a failure to interview witnesses).

10. Jason Tortora, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 FORDHAM URB. L.J. 1493, 1518 (2013).

11. *Id.*; see Wydick, *supra* note 8, at 3–4.

12. See Wydick, *supra* note 8, at 3–4.

preparation allows a prosecutor to rehearse a witness's testimony with the witness, which will make the witness more comfortable when testifying in court. The prosecutor can discuss effective courtroom demeanor with the witness and give the witness examples of the questions he or she may face on cross-examination. All of this practice will help willing witnesses become comfortable with testifying in court and may ease hesitant witnesses' concerns, encouraging them to come forward and testify.

Preparing witnesses can also increase fairness within the criminal justice system. Witness interviews and meetings provide prosecutors with a setting to emphasize the utmost importance of remaining truthful, both during pretrial interviews and while testifying at trial. Moreover, witness prep also provides opportunities for prosecutors to identify *Brady* or *Giglio* material that must be handed over to the defense, which will further the system's justice-seeking goals.

As can be seen, witness prepping is a necessary process for prosecutors to engage in to successfully fulfill their duties. Nevertheless, the detriments of witness coaching necessitate that measures be implemented to ensure that prosecutors do not abuse the process by engaging in coaching.

#### *B. Four Grades of Witness Coaching*

While prepping witnesses, prosecutors must be careful not to cross the line into the territory of witness coaching. In contrast to proper witness prepping, "witness coaching" refers to improper conduct on behalf of a prosecutor. As used in this Note, the term "witness coaching" means conduct by a prosecutor that changes a witness's account about a particular event.<sup>13</sup> Witness coaching may occur through various methods: providing a witness with crib notes or a script to use while testifying on the stand, making cringing facial expressions and throwing up one's hands in despair during rehearsal when a witness provides a bad fact for the prosecution, responding to a witness's account with statements such as "we'll lose if you say that," and preparing witnesses together to ensure they give "consis-

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13. Wydick, *supra* note 8, at 2. This definition of witness coaching is notably vague and leaves open a lot of questions about what is or is not improper. In particular, does improper witness coaching require improper intent? Is it considered improper coaching for a prosecutor to unknowingly alter a witness's testimony? Is it improper witness coaching for a prosecutor to alter a witness's account of events when the prosecutor is certain that the witness is wrong or confused about a detail? What if the prosecutor believes in good faith that the witness is mistaken? These questions will be addressed later in this Section.

tent” testimony.<sup>14</sup> This Part will discuss four categories of conduct that constitute different levels of witness coaching. Professor Wydick<sup>15</sup> has established three gradations of witness coaching, which differ in their levels of intentionality and explicitness of coaching.<sup>16</sup> In addition to Professor Wydick’s three grades of coaching, I will discuss a potential fourth grade.

Grade One witness coaching occurs when a prosecutor knowingly and explicitly induces a witness to give false testimony.<sup>17</sup> A prosecutor acts knowingly when he possesses “actual knowledge” that a witness’s testimony is false. A prosecutor’s knowledge may be inferred from the circumstances.<sup>18</sup> Similarly, Grade Two witness coaching occurs when a prosecutor knowingly induces a witness to provide false testimony, but instead of acting directly, the prosecutor encourages a witness indirectly.<sup>19</sup> A prosecutor “sends the witness a message ‘between the lines’ about how to tell the story. If the witness understands the message and wants to cooperate, he alters the story accordingly.”<sup>20</sup> Grade Three witness coaching is just as dangerous as (if not more dangerous than) Grades One and Two witness coaching. Through Grade Three witness coaching, a prosecutor does not knowingly induce a witness to relay false testimony.<sup>21</sup> Nevertheless, the communications and interactions between the prosecutor and the wit-

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14. Underwood, *supra* note 9, at 779–80.

15. Professor Richard C. Wydick has provided one of the leading academic articles on witness coaching. His article does an outstanding job of defining the term “witness coaching, and breaking up witness coaching into three understandable levels of conduct.” His article has been cited in articles, notes, and books. *E.g.*, PRISCILLA ANNE SCHWAB & LAWRENCE J. VILARDO, *THE LITIGATION MANUAL: DEPOSITIONS* 1, 38 (2006); Felicia Carter, *Court Order Violations, Witness Coaching, and Obstructing Access to Witnesses: An Examination of the Unethical Attorney Conduct that Nearly Derailed the Moussaoui Trial*, 20 *GEO. J. LEGAL ETHICS* 463, 468 (2007); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 *CARDOZO L. REV.* 829, 829 (2002).

16. Wydick, *supra* note 8, at 3–4.

17. *Id.* at 21–22 (“[T]he requirement of known false testimony can be met in two ways. First, the lawyer may know that the testimony is a false statement of the events in question . . . . Second, the lawyer may know that the testimony is a false statement of what the witness believes about the events in question.”). For examples of Grade One witness coaching, see *id.* at 19–22.

18. *Id.* at 19.

19. *Id.* at 25. For examples of Grade Two witness coaching, see *id.* at 30–37.

20. *Id.* at 30–37.

21. A prosecutor can unknowingly witness coach under two circumstances: (1) when a prosecutor has knowledge of the conduct in which he is engaging (i.e., suggestive line of questioning) but lacks knowledge of the harmful effects that such conduct has on a witness’s testimony and (2) when a prosecutor is unaware of the conduct in which he is engaging.

ness influence the witness's account of events.<sup>22</sup> While Grade Three witness coaching lacks a corrupt intent, it nonetheless obstructs justice. This prosecutorial practice is difficult to circumvent,<sup>23</sup> which may in fact make it the most dangerous type of witness coaching. Prosecutors need to be aware of the perils of Grade Three witness coaching, as well as the manners in which they can prevent such conduct from occurring. In this Note, particular attention will be paid to prosecutors who engage in Grade Three witness coaching, as safeguards and sanctions are unable to deter behavior that prosecutors are unaware is occurring.

Last, and a bit trickier than the first three grades of witness coaching, is what I will call Grade Four witness coaching. Through Grade Four witness coaching, a prosecutor knowingly induces a witness to alter his or her false testimony. However, in this case, the prosecutor does so with either the knowledge or a good-faith belief that the witness is mistaken or confused in his or her account of the event. Two scenarios can result from this conduct: (1) the prosecutor was correct and he or she corrects the witness's mistake or (2) the prosecutor was incorrect and he or she falsely alters the witness's account of the event. While scenario one appears to be permissible behavior that we should want to encourage, scenario two is improper conduct that we should strive to prevent. There are some factors that may affect whether "correcting" a witness will result in scenario one or scenario two. For example, the availability of irrefutable evidence such as video recordings would tend to result in scenario one, whereas having sole possession of corroborating statements made by another witness—especially a *cooperating* witness, who may have additional incentives to make a false statement<sup>24</sup>—would likely give rise to scenario two. It appears that in situations in which a prosecutor possesses independent and likely irrefutable evidence that indicates that a witness is mistaken, it would not be harmful—and would often be beneficial—to attempt to correct the witnesses' account of events. On the contrary, where the independent evidence may or may not be accurate, it can be harmful to prompt a witness's memory.

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22. Wydick, *supra* note 8, at 37; *see also* Harold K. Gordon, *Crossing the Line on Witness Coaching*, N.Y.L.J., July 8, 2005, at 16 ("Improper witness coaching also occurs when an attorney unintentionally causes the witness to modify his story. For example, excessive use of leading or suggestive questions during an initial witness interview may cause the witness to alter his memory to give the lawyer what the witness thinks the lawyer wants to hear."). For an example of Grade Three witness coaching, *see* SCHWAB & VILARDO, *supra* note 15.

23. Wydick, *supra* note 8, at 4.

24. These unique incentives will be discussed *infra* Section II.B.4.

Thus, whether it is proper for a prosecutor to engage in Grade Four witness coaching likely depends on the foundation underlying the prosecutor's influence. As a fuzzy line separates proper from improper conduct, I propose that a prosecutor should refrain from altering a witness's account in either case. Instead, when such a situation arises, a prosecutor should make use of any independent evidence to refute the details in the witness's statement that he or she knows or believes to be incorrect. Furthermore, a prosecutor should utilize expert testimony on the fallibility of memory to help explain why the witness was or may have been mistaken in his or her account of the event.

## II.

### DETRIMENTS OF WITNESS COACHING

To understand witness coaching and why it is so dangerous, it is important to appreciate how human memory works. Amidst a legal system in which physical evidence is sparse and the majority of verdicts are based on eyewitnesses and their memory reports,<sup>25</sup> an understanding of memory and the accuracy of testimony is crucial. When a witness remembers something that did not actually occur or makes errors about essential details, unjust verdicts may be returned. This Part will discuss the science behind false memories and suggestibility, explain why witness coaching is so detrimental, and describe groups of people who are especially vulnerable to witness coaching. It will then discuss incentives that drive prosecutors to engage in coaching and illustrate real-life effects of prosecutorial witness coaching.

#### A. *Science Behind Memory Fallibility and Suggestibility*

##### 1. *Memory Fallibility*<sup>26</sup>

Scientific studies have shown time and time again that human memory is imperfect.<sup>27</sup> It is significant—and frightening—that false

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25. Mark L. Howe & Martin A. Conway, *Introduction to Special Issue Memory and the Law: Insights from Case Studies*, 21 *MEMORY* 545, 545 (2013).

26. The discussion in the ensuing Section draws heavily on my earlier, unpublished work. See Brittany Cohen, *You Can't Handle the Truth: Gist Memory Leads to Predictable False Memory Effects with Age* (May 5, 2012) (unpublished senior honors thesis, Cornell University) (on file with Cornell University Library, Division of Rare and Manuscript Collections).

27. See, e.g., Charles J. Brainerd & Ambrocio H. Mojardin, *Children's and Adults' Spontaneous False Memories: Long-Term Persistence and Mere Testing Effects*, 69 *CHILD DEV.* 1361, 1375 (1998); Valerie F. Reyna & Barbara Kiernan, *Development of Gist Versus Verbatim Memory in Sentence Recognition: Effects of Lexical Familiar-*

memories can occur without any improper suggestive questioning.<sup>28</sup> These distortions result from “the everyday functioning of memory.”<sup>29</sup>

Recent models of memory theorize that there are two types of features that are encoded during experiences: surface features and semantic features.<sup>30</sup> The two features differ in that surface features—or “verbatim traces”—are actual characteristics of events that are remembered, whereas semantic features—or “gist traces”—are the meanings (i.e., interpretation and inference) that individuals connect with an event.<sup>31</sup> Every experience has its own representation that is stored in long-term memory and becomes accompanied by certain surface and semantic features that are stored discretely.<sup>32</sup> There are various circumstances that influence which features an individual stores and retrieves, and that ultimately affect whether that individual provides a true or false account of an event.<sup>33</sup>

Numerous scientific experiments have been performed to determine the factors that increase and decrease spontaneous false-memory reports.<sup>34</sup> These experiments often occur as follows: the experimenter will present the participant with a list of target words. The words included in the list are all semantically related to a critical word, which is not presented in the list.<sup>35</sup> After a specified period of time, the experimenter will test the participant by either: (a) asking the participant

ity, *Semantic Content, Encoding Instructions, and Retention Interval*, 30 DEV. PSYCHOL. 178, 188 (1994).

28. See Brainerd & Mojardin, *supra* note 27, at 1375; Reyna & Kiernan, *supra* note 27.

29. Charles J. Brainerd et al., *Fuzzy-Trace Theory and False Memory: Memory Theory in the Courtroom*, in FALSE-MEMORY CREATION IN CHILDREN AND ADULTS 93, 95–96 (David F. Bjorklund ed., 2000).

30. BRAINERD & REYNA, *supra* note 7, at 82–83.

31. *Id.* at 84.

32. *Id.* at 84–85. Surface features (i.e., details of an event) assist in creating true memories of an event, while helping to reduce false memories of an event. Semantic features (i.e., meaning of an event) also assist in establishing true memories of an event. However, at the same time, semantic features increase the likelihood of creating memories that are consistent with the meaning of an event but are nevertheless false. *Id.* at 87.

33. *Id.* at 100–53.

34. See, e.g., Charles J. Brainerd et al., *Theoretical and Forensic Implications of Developmental Studies of the DRM Illusion*, 39 MEMORY & COGNITION 365, 365–68 (2010); Daniel R. Kimball & Robert A. Bjork, *Influences of Intentional and Unintentional Forgetting on False Memories*, 131 J. EXPERIMENTAL PSYCHOL. 116, 126 (2002); Henry L. Roediger III et al., *Factors that Determine False Recall: A Multiple Regression Analysis*, 8 PSYCHONOMIC BULL. & REV. 385, 385 (2001).

35. See Henry L. Roediger III & Kathleen B. McDermott, *Creating False Memories: Remembering Words Not Presented in Lists*, 21 J. EXPERIMENTAL PSYCHOL. 803, 804 (1995) (“For example, for the critical word *needle*, the list words were *thread, pin, eye, sewing, sharp, point, pricked, thimble, haystack, pain, hurt, and injection.*”).

to recall the words that were presented<sup>36</sup> or (b) asking the participant whether certain words<sup>37</sup> were provided or not provided during the original list of target words.<sup>38</sup> This is known as the Deese-Roediger-McDermott (DRM) paradigm.<sup>39</sup>

Experiments using the DRM paradigm have found surprisingly high levels of false recall and false recognition.<sup>40</sup> In an experiment published in 1995, Henry L. Roediger III and Kathleen B. McDermott presented six twelve-word DRM lists to students, who were then asked to recall the lists and complete a recognition test that incorporated both presented and non-presented words, including the non-presented critical words.<sup>41</sup> On the immediate free recall tests, the students falsely recalled the non-presented critical words forty percent of the time.<sup>42</sup> On the later recognition tests, the students falsely recognized the non-presented critical words eighty-four percent of the time.<sup>43</sup> In a second experiment, where twenty-four fifteen-word lists were presented to students, false recall of non-presented critical words increased to fifty-five percent.<sup>44</sup> While this may come as a shock to many, “[t]he results reveal a powerful illusion of memory: [p]eople remember events that never happened.”<sup>45</sup>

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36. This is known as a “recall” test. See Frank Haist et al., *On the Relationship Between Recall and Recognition Memory*, 18 J. EXPERIMENTAL PSYCHOL. 691, 691 (1992) (“Subjects explicitly evaluate their memory and can either retrieve items (recall) or make judgments as to whether or not items are familiar (recognition).”).

37. For example, a target word, a critical word, a synonym of a target word, or an antonym of a target word.

38. This is known as a “recognition” test. See Haist et al., *supra* note 36, at 691.

39. See BRAINERD & REYNA, *supra* note 7, at 92.

40. See, e.g., Brainerd et al., *supra* note 34, at 366–68, 376–77 (reviewing studies indicating that rates of false recall and false recognition on DRM tasks increase with the subjects’ age); Roediger & McDermott, *supra* note 35, at 804, 809 (presenting two experiments indicating high levels of false recall and false recognition on DRM tasks).

41. See Roediger & McDermott, *supra* note 35. Critical non-presented words are words to which all of the presented words in the list are somehow semantically related. *Id.* at 804.

42. *Id.* at 805. It is important to note that all other non-presented words were recalled fourteen percent of the time—a low rate—indicating that “subjects were not guessing wildly in the experiment.” *Id.* at 806.

43. *Id.* at 806. This false recognition rate is exceedingly close to the true recognition of presented words at a rate of eighty-six percent. See *id.*

44. *Id.* at 809.

45. *Id.* at 803. For examples of factors that have been found to increase or reduce false memory rates, see BRAINERD & REYNA, *supra* note 7, at 106–54, including duration, repetition, deep and shallow processing, event distinctiveness, consolidation activity, cuing, instructions, and sleeper effects.

## 2. *Effect of Suggestive Interviewing Techniques*

In addition to false reports that occur spontaneously, suggestive interview techniques, which intentionally or inadvertently implant misinformation in a witness's memory, can also cause or enhance false memory reports. Suggestibility has been defined as "the extent to which individuals come to accept and subsequently incorporate post-event information into their memory recollections."<sup>46</sup> Scientific experiments involving suggestibility typically occur as follows: the experimenter will show the participant an event, which is the target material (e.g., video footage of a car accident). The experimenter will then present the participant with misinformation that is usually in the form of suggestions or "distractors" about material that was not presented, but is related to the presented material<sup>47</sup> (for example, "Did you see any broken glass?"). This related misinformation will either conflict with specific presented material<sup>48</sup> or will not conflict with specific presented material.<sup>49</sup> The experimenter will later test the participant's memory of the event originally shown.<sup>50</sup> This procedure for studying the effects of suggestion is called the "misinformation paradigm."<sup>51</sup>

Studies on memory suggestibility using the misinformation paradigm show two primary findings: (1) true recognition rates for target material are lower when conflicting information (inconsistent distractors) has been presented during the experiment than when it has not been presented and (2) false recognition rates for distractors are higher when the distractors were presented in the experiment as misinformation than when they were not.<sup>52</sup> These findings illustrate that when misinformation is presented to individuals, they remember less true information and falsely remember more of the implanted misinformation.

In practice, this means that the presentation of information by a prosecutor that is related to—but inconsistent with—a witness's actual account of events can result in the witness later failing to identify details from his or her original account and/or adding inaccurate details that have been provided by the prosecutor. For example, suppose Criminal X, without using a weapon, robbed a woman on the street.

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46. STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* 44 (1995).

47. See Brainerd et al., *supra* note 29, at 97.

48. See *id.* at 96–97. This is known as an "inconsistent distractor."

49. See *id.* This is known as a "consistent distractor."

50. See *id.* at 96 (noting that the test is generally a recognition test, in which the subject is asked to accept presented terms and reject all others).

51. See BRAINERD & REYNA, *supra* note 7, at 230–31.

52. Brainerd et al., *supra* note 29, at 97.

Witness A observed the robbery and called the police. The police recovered a gun in a trashcan near the scene of the robbery. The gun happened to be unrelated to the robbery and connected to a different crime. The prosecutor suggests to Witness A, “You probably saw Criminal X holding that gun we found in the trash can,” an event that is undoubtedly consistent with many robberies. Later, Witness A makes a false memory report that he had seen Criminal X holding a gun during the robbery (which never actually happened), as he has a clear, detailed memory of the event but does not realize that his memory is from the context of the prosecutor’s coaching, rather than the crime itself.

### *B. Witnesses Most Vulnerable to Suggestibility*

Due to general characteristics possessed by certain people, some groups of witnesses are more vulnerable to coaching techniques than others. These groups of people include identification witnesses, child witnesses, elderly witnesses, and cooperating witnesses. It is important that prosecutors be informed about circumstances and techniques that may facilitate false memory reports by these types of witnesses in order to prevent the creation of false reports.

#### *1. Identification Witnesses*

False eyewitness identification has been found to be the most prominent cause of wrongful convictions.<sup>53</sup> Research suggests that eyewitnesses to a crime are inherently inaccurate in their identification of suspects.<sup>54</sup> This is well known in the legal realm.<sup>55</sup> While the

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53. See BRAINERD & REYNA, *supra* note 7, at 3; see also Bennett L. Gershman, *The Eyewitness Conundrum: How Courts, Police and Attorneys Can Reduce Mistakes by Eyewitnesses*, 81 N.Y. ST. B.J. 24, 24, 29 (2009); Saul M. Kassin, *Eyewitness Identification Procedures: The Fifth Rule*, 22 L. & HUM. BEHAV. 649, 649 (1998); Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 360 (1998).

54. A 2004 study looked at forty-eight experiments involving eyewitness identifications in which the offender was completely visible, the identifications were made at a reasonable time after the participant viewed the event, and the identification procedures used were lineup and photo spreads with four or more choices. When the offender was present in the lineup or photo spread, the participants falsely identified an innocent suspect twenty-seven percent of the time, whereas when the offender was absent from the lineup or photo spread, the participants falsely identified an innocent suspect fifty-seven percent of the time. See BRAINERD & REYNA, *supra* note 7, at 38–39 (citing R.N. Haber & L. Haber, *A Meta-Analysis of Research on Eyewitness Line-up Accuracy* (2004) (unpublished manuscript)). For further research on which identification procedures are detrimental, see R.C. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup*

United States Supreme Court has afforded constitutional protection for the most flagrantly suggestive identification procedures, this protection is limited.<sup>56</sup> As a result of these limitations, prosecutors must take measures to provide further protection and to prevent eyewitness misidentifications from producing wrongful convictions.<sup>57</sup>

Since law enforcement agents, rather than prosecutors, are the actors who administer identification procedures, it is necessary to address the role that prosecutors should play in controlling the conduct of their law enforcement agents. Prosecutors should have a duty to ensure that their agents use proper eyewitness identification procedures. The knowing failure to prevent the use of eyewitness identification procedures that are proven to elicit false identifications should be viewed as a form of witness coaching. Moreover, prosecution offices should be obliged to notify the relevant law enforcement agency or department if they discover that an officer has used a suggestive technique. If a prosecutor is unable to control the conduct by law enforcement in any given case, he or she should be responsible for evaluating

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*Presentation*, 70 J. APPLIED PSYCHOL. 556 (1985) (describing a study finding sequential presentations of lineups to produce fewer false identifications than simultaneous presentations); Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & HUM. BEHAV. 283 (1997) (analyzing various studies that suggest that accuracy in lineup eyewitness identifications is controlled by the type of lineup presented to the witness); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 55 ANN. REV. PSYCHOL. 278, 280–89 (2003) (describing factors that have been found to influence the accuracy of eyewitness identification).

55. See *United States v. Wade*, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”); see also Gershman, *supra* note 53.

56. See, e.g., Gershman, *supra* note 53, at 25 (“The due process guarantee offers only limited constitutional protection, however. Highly suggestive identification procedures often do not rise to the level of a due process violation.”); see also *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972) (describing the factors to consider in determining whether an identification is reliable despite the use of suggestive procedures); *Simmons v. United States*, 390 U.S. 377, 384 (1968) (holding that “each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification”); *Wade*, 388 U.S. at 237 (finding that the defendant should have had the assistance of counsel at a post-indictment lineup, that the defendant and counsel should have been informed of the upcoming lineup, and that, unless waived, counsel’s presence at lineups should be required); Gershman, *supra* note at 53, at 26, 29.

57. Gershman, *supra* note 53, at 25 (“For the prosecutor, this means evaluating the eyewitness’s identification with greater care and not proceeding with a case that rests on the uncorroborated testimony of an eyewitness, unless the prosecutor is personally satisfied beyond any reasonable doubt that the eyewitness is making a reliable identification.”).

the reliability of the identification that was made, in relation to the rest of the case's evidence, to determine whether he or she should proceed with the case.<sup>58</sup> Furthermore, a prosecutor should have the duty to abstain from intentionally or inadvertently altering an identification witness's testimony to bolster the witness's identification, from provoking further facts to enhance the eyewitness's testimony, and from augmenting or reducing a witness's confidence or certainty in his testimony or identification.<sup>59</sup>

## 2. Child Witnesses

For many years, detrimentally suggestive and leading interrogation techniques were used on children, specifically within the area of child sexual abuse.<sup>60</sup> The frequent use of these methods was triggered by research studies demonstrating that interviews asking children to freely recall alleged instances of sexual abuse produced inadequate information.<sup>61</sup> While suggestive and leading questioning may yield answers, the use of these techniques on children is problematic, because evidence indicates that children are especially vulnerable to suggestive questioning.<sup>62</sup> Factors that have been shown to increase children's false reports include repetition of misinformation,<sup>63</sup> high credibility of the source of information,<sup>64</sup> high plausibility of the mis-

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58. *See id.* at 26 (discussing how prosecutors are in a better position than jurors to evaluate an eyewitness's reliability).

59. *Id.* at 27.

60. *See generally* BRAINERD & REYNA, *supra* note 7, at 292–94 (discussing reasons why some researchers believe that suggestive techniques are necessary for interviewing children and raising concerns about the reliability of statements from such interviews).

61. *Id.* at 294–95; *see also, e.g.*, Helen R. Dent & Geoffrey M. Stephenson, *An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses*, 18 BRIT. J. SOC. & CLINICAL PSYCHOL. 41, 43 (1979); Mark L. Howe, *Misleading Children's Story Recall: Forgetting and Reminiscence of the Facts*, 27 DEV. PSYCHOL. 746 (1991).

62. BRAINERD & REYNA, *supra* note 7, at 156–57, 296–97 (describing the Martin Preschool case in which child sexual abuse charges were brought against preschool teachers and the teachers were later acquitted because the interviews of the children were highly suggestive); Kathy Pezdek & Chantal Roe, *The Effect of Memory Trace Strength on Suggestibility*, 60 J. EXPERIMENTAL CHILD PSYCHOL. 116, 117 (1995); Kathy Pezdek & Chantal Roe, *The Suggestibility of Children's Memory for Being Touched: Planting, Erasing, and Changing Memories*, 21 L. & HUM. BEHAV. 95 (1997).

63. BRAINERD & REYNA, *supra* note 7, at 313–14.

64. *See, e.g.*, Michael P. Toglia et al., *The Suggestibility of Children's Memory: A Social-Psychological and Cognitive Interpretation*, in DEVELOPMENT OF LONG-TERM RETENTION 217 (Mark L. Howe et al. eds., 1992); Melissa K. Welch-Ross, *Interviewer Knowledge and Preschoolers' Reasoning About Knowledge States Moderate Suggestibility*, 14 COGNITIVE DEV. 423, 431–33 (1999).

information,<sup>65</sup> low degree of support from the interviewer,<sup>66</sup> and use of anatomically detailed dolls.<sup>67</sup> These factors must be taken into account when interviewing child witnesses to prevent tainted testimony.

### 3. *Elderly Witnesses*

Elderly witnesses are also susceptible to witness coaching by prosecutors due to a shift in memory processes that occurs in late adulthood.<sup>68</sup> Specifically, there is evidence that memory processes shift from a reliance on surface features (the details of an event) toward a reliance on semantic features (the meaning of an event) during aging, which leads to a reduction in the accuracy of elderly memory reports.<sup>69</sup> Several studies have demonstrated that older adults are more vulnerable to misinformation than are younger adults.<sup>70</sup> Furthermore, older adults state higher levels of confidence when reporting false information.<sup>71</sup> It is important to consider these scientific findings when interviewing elderly witnesses.

### 4. *Cooperating Witnesses*

Prosecutors often rely on the testimony of cooperating witnesses, especially when there is a shortage of other evidence against a defen-

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65. See, e.g., Kathy Pezdek & Danielle Hodge, *Planting False Childhood Memories in Children: The Role of Event Plausibility*, 70 *CHILD DEV.* 887, 887 (1999).

66. See, e.g., Suzanne L. Davis & Bette L. Bottoms, *Effects of Social Support on Children's Eyewitness Reports: A Test of the Underlying Mechanism*, 26 *L. & HUM. BEHAV.* 185, 185 (2002).

67. See, e.g., Maggie Bruck et al., *Children's Use of Anatomically Detailed Dolls to Report Genital Touching in a Medical Examination: Developmental and Gender Comparisons*, 6 *J. EXPERIMENTAL PSYCHOL.* 74 (2000).

68. Carlos F.A. Gomes, Brittany R. Cohen, Alisha Desai, Charles J. Brainerd & Valerie F. Reyna, *Aging and False Memory: Fuzzy-Trace Theory and the Elderly Eyewitness*, in *THE ELDERLY EYEWITNESS IN COURT* 137, 141–42 (Michael P. Toglia et al. eds., 2014).

69. *Id.* For example, “[o]lder adults usually perform worse than younger adults on tasks that require remembering detailed information (surface features), such as source memory (e.g., remembering the color and font of studied words),” “older adults have greater difficulty distinguishing events that were shown in a video from events that were shown in photographs, relative to younger adults,” and “differences between younger and older adults are larger in tasks slanted toward retrieval of precise details, such as associative memory tasks.” *Id.* at 141–42.

70. Tammy A. Marche et al., *Interviewing the Elderly Eyewitness*, in *THE ELDERLY EYEWITNESS IN COURT*, *supra* note 68, at 263, 275; see, e.g., Karen J. Mitchell et al., *Source Monitoring and Suggestibility to Misinformation: Adult Age-Related Differences*, 17 *APPLIED COGNITIVE PSYCHOL.* 107, 116 (2003); Henry L. Roediger III & Lisa Geraci, *Aging and the Misinformation Effect: A Neuropsychological Analysis*, 33 *J. EXPERIMENTAL PSYCHOL.* 321, 332 (2007).

71. See sources cited *supra* note 70.

dant.<sup>72</sup> Prosecutors' great reliance on cooperators is alarming, as these witnesses are especially susceptible to coaching by prosecutors.<sup>73</sup> In addition to any inherent tendency toward suggestibility a standard witness may possess, cooperating witnesses possess a unique motive to obtain leniency in relation to their own offenses.<sup>74</sup> The danger stems from the fact that cooperating witnesses are aware that they will not obtain leniency if they are unable to provide the prosecutor with information that benefits the prosecution in proving its case.<sup>75</sup> This knowledge incentivizes cooperating witnesses to provide prosecutors with information they believe the prosecutors wish to hear.<sup>76</sup>

In addition to possessing incentives to fabricate testimony in pursuit of leniency, cooperating witnesses have the ability to do so without exposure. Often, cooperators will lie about small details of a case that are "not readily discoverable or easily disproved" and go undetected.<sup>77</sup> Furthermore, prosecutors tend to believe slight lies if they are able to verify the other testimony given by the cooperating witness.<sup>78</sup> Cooperators may learn of favorable, but false, information from outside sources such as the media or their attorneys before conversations with the prosecution even take place.<sup>79</sup> They may also receive information for fabrications from prosecutors themselves during pre-trial interviews, either verbally or non-verbally, through the prosecutors' intentional or inadvertent witness coaching.<sup>80</sup> Examples of prosecutorial conduct that may inadvertently lead to a cooperator's ability to falsely alter his testimony include: unintentionally asking a leading question, conveying approval or dissatisfaction when the cooperator answers a question, and disclosing a fact that was unknown to the cooperator.<sup>81</sup> As studies indicate that the testimony of these witnesses play a significant role in wrongful convictions,<sup>82</sup> particular at-

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72. Sam Roberts, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 *FORDHAM L. REV.* 257, 259 (2005).

73. *Id.* at 260.

74. *Id.* Leniency from the prosecution may include dismissing pending charges, agreeing to a reduced sentence, or recommending to the court that it be lenient in sentencing. *Id.* at 262–63.

75. *Id.* at 270–71.

76. *Id.*

77. *Id.* at 271.

78. *Id.* at 271–72.

79. *Id.* at 272.

80. *Id.* at 273.

81. *Id.*

82. See, e.g., *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction> (last visited Nov. 15, 2015) (listing the testimony of informants and snitches as a major factor in 48 of the first

tention must be paid to the techniques that prosecutors use to prepare cooperating witnesses to testify.

### C. *Why Do Prosecutors Engage in Witness Coaching?*

In order to develop methods to prevent witness coaching, it is important to understand why prosecutors engage in this conduct. Despite the problems caused by witness coaching and the unethical implications of the practice, there are incentives that may be driving prosecutors to engage in this behavior, such as eliminating inconsistencies in a witness's testimony in order to strengthen the prosecution's case and obtain a conviction.<sup>83</sup> Furthermore, prosecutors may be motivated to encourage witnesses to conform their testimony to that of other witnesses in order to conceal weaknesses in the government's case<sup>84</sup> or embarrassing details about a witness.<sup>85</sup>

Systematic defects also encourage witness coaching by prosecutors. The above behaviors are fueled by the existence of a perverse incentive structure, in which rewards for prosecutors are often driven by prosecution and conviction rates.<sup>86</sup> When prosecutors are rewarded for obtaining convictions, focus may be placed on bringing and winning cases instead of engaging in proper techniques that will yield accurate results.<sup>87</sup> The lack of clarity within existing ethics rules in this area provides insufficient guidance to prosecutors, further fueling

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325 wrongful convictions to be overturned by the results of post-conviction DNA testing).

83. Gershman, *supra* note 15, at 834; *see also* *Kyles v. Whitley*, 514 U.S. 419 (1995) (conviction reversed on grounds that the government failed to disclose earlier statements made by a key eyewitness that were inconsistent with the testimony he provided at trial).

84. Carter, *supra* note 15, at 463–67 (detailing how a prosecutor provided witnesses with suggestions via email on what to include in his or her testimony in order to strengthen the government's case).

85. Gershman, *supra* note 15, at 836; *see also* *Alcorta v. Texas*, 355 U.S. 28 (1957).

86. *See* INIMAI M. CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION 1, 12 (2013), [https://www.brennan-center.org/sites/default/files/publications/REFORM\\_FUND\\_MASS\\_INCARC\\_web\\_0.pdf](https://www.brennan-center.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_0.pdf).

87. DENNIS J. STEVENS, MEDIA AND CRIMINAL JUSTICE: THE CSI EFFECT 252 (2011) (“Additionally, a prosecutor has an incentive to win convictions because his or her success is determined by those wins, which would impact political ambitions, future elections, and financial and funding benefits.”); Nicole Flatow, *How Prosecutor Win Rates and Informants Drive Wrongful Murder Convictions*, THINKPROGRESS (May 28, 2013), <http://thinkprogress.org/justice/2013/05/28/2067671/how-prosecutor-win-rates-and-informants-drive-wrongful-murder-convictions> (“[P]rosecutors whose bonuses, promotions, and sometimes election are tied to conviction rates and prominent ‘wins’ have perverse incentives to instead score any conviction at all.”).

improper coaching.<sup>88</sup> Inadequate mechanisms exist to detect and punish prosecutors who engage in improper witness coaching.<sup>89</sup> Lastly, prosecutors may lack incentives to refrain from witness coaching because they remain uninformed about what constitutes suggestive techniques, or because they do not understand or believe the effect they can actually have on a witness's account of events.<sup>90</sup>

*D. The Consequences of Witness Coaching:  
Why Reform Is Necessary*

While some prosecutors may believe it is harmless, there are countless instances in which witness coaching has devastated people's lives.<sup>91</sup> Over the past several decades, there has been a disturbing uncovering of wrongful convictions, many of which were caused by identifications or witness testimony that had been influenced by law enforcement or prosecutors.<sup>92</sup> A report by the Innocence Project documents cases throughout the country involving eyewitness misidentifications that have resulted in convictions, where the convictions were later overturned through DNA testing.<sup>93</sup> This report records 147 innocent individuals who were wrongfully convicted over the past several decades as a result of improper conduct and who each consequently lost between one and twenty-seven years of his or her life in prison.<sup>94</sup>

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88. The insufficient ethical standards will be discussed below in Section III.A.

89. Courts' failure to penalize prosecutors for witness coaching will be discussed in Section III.B.

90. Gershman, *supra* note 15, at 839.

91. *See, e.g.*, Elizabeth Barber, *Dallas Targets Wrongful Convictions, and Revolution Starts to Spread*, CHRISTIAN SCI. MONITOR (May 25, 2014), <http://www.csmonitor.com/USA/Justice/2014/0525/Dallas-targets-wrongful-convictions-and-revolution-starts-to-spread>; Martha Neil, *Ex-Inmate Sues 7 Lawyers in Brooklyn DA's Office, Says He Was Framed in Rabbi's Murder*, A.B.A. J. (Feb. 16, 2011, 6:31 PM), [http://www.abajournal.com/mobile/article/ex-inmate\\_sues\\_7\\_lawyers\\_in\\_brooklyn\\_das\\_office\\_says/](http://www.abajournal.com/mobile/article/ex-inmate_sues_7_lawyers_in_brooklyn_das_office_says/); Marianne Salcedo, *Motivated by Innocence, Jabbar Collins Awarded \$13 Million*, PLAIN ERROR (Oct. 22, 2014, 10:56 AM), <http://floridainnocence.org/content/?tag=unreliable-witness-testimony>.

92. *See, e.g.*, Barber, *supra* note 91 (describing how seventeen years after his conviction for murder and attempted murder, Richard Miles was exonerated in 2012 when the Dallas District Attorney's Conviction Integrity Unit uncovered evidence that the case's prosecutor had encouraged a witness to lie); Salcedo, *supra* note 91 (describing how after serving fifteen years in a New York prison, Jabbar Collins was exonerated in 2010 from his conviction for murdering a rabbi when it was revealed that the prosecutor on the case had knowingly coerced and bribed three witnesses to testify at Collins's trial and relied on that false testimony to convict Collins).

93. INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION (2009), [http://www.innocenceproject.org/files/imported/eyewitness\\_id\\_report.pdf/view](http://www.innocenceproject.org/files/imported/eyewitness_id_report.pdf/view).

94. *Id.*

Even in cases in which witness coaching does not directly lead to a wrongful conviction, a prosecutor's improper conduct undermines the goals of the criminal justice system and the prosecutor's role to seek justice. Each defendant within the criminal justice system is entitled to a fair trial, untainted by improper influence by the government. Insufficient guidance and protections currently pervade the area of prosecutorial witness coaching; the harmful effects of witness coaching make it vital to develop measures to prevent prosecutors from coaching witnesses.

### III.

#### LEGAL STANDARDS

The American Bar Association's Model Rules of Professional Conduct and Criminal Justice Standards, in addition to decisions by the courts, provide prosecutors with some guidance on how to prepare their witnesses. This guidance, however, is too broad and lacking in detail to provide sufficient direction to prosecutors to prevent witness coaching. Furthermore, the safeguards and remedies currently in place are inadequate to deter witness coaching.

#### A. *Ethics Rules*

The American Bar Association (ABA) has adopted the Model Rules of Professional Conduct,<sup>95</sup> and many states have followed suit.<sup>96</sup> In addition to the ABA Rules, the ABA has adopted the Criminal Justice Standards, a series of ethical standards that provide guidance specifically to practitioners within the criminal justice system.<sup>97</sup> I will refer to this body of guidance, taken as a whole, as the "Rules and Standards."

While the current model ethics rules do not directly address witness coaching,<sup>98</sup> several of the ABA Rules and Standards tangentially address issues concerning witness coaching and will be discussed be-

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95. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2002). While these rules were not established specifically for prosecutors, they are nonetheless applicable to all attorneys and are therefore relevant to examine.

96. See *Alphabetical List of States Adopting Model Rules*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited Nov. 11, 2015).

97. See AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION AND DEFENSE FUNCTION (4th ed. 2015), [http://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html).

98. Roberta K. Flowers, *Witness Preparation: Regulating the Profession's "Dirty Little Secret,"* 38 HASTINGS CONST. L.Q. 1007, 1010 (2011).

low. At the outset, it is important to note two common themes that pervade these Rules and Standards: (1) the Rules and Standards either (a) fail to prohibit unintentional (Grade Three) coaching and/or intentional coaching with good intent (Grade Four) or (b) fail to give an intent requirement at all, such that a wide array of improper conduct that should be prohibited is instead considered permissible; and (2) the Rules and Standards lack specificity on the type of conduct that constitutes improper witness coaching. As such, our current system provides insufficient guidance to prosecutors and other attorneys.

### 1. *Rules and Standards Covering Only “Knowing” Conduct*

Two model ethics rules appear to address Grades One and Two witness coaching but fail to cover Grades Three and Four. First, ABA Rule 3.3(a)(3) states that “[a] lawyer should not knowingly . . . offer evidence that the lawyer knows to be false.” The ABA defines knowingly as involving “actual knowledge of the fact in question,” which “may be inferred from circumstances.”<sup>99</sup> Similar to Rule 3.3(a)(3) is Standard 3-6.6, which provides guidance specific to prosecutors regarding the presentation of false evidence.<sup>100</sup> Rule 3.3(a)(3) and Standard 3-6.6 fail to delineate the level of knowledge a lawyer must have to fulfill these requirements.<sup>101</sup> A narrow interpretation of the rule and standard fails to regulate prosecutors who present testimony they do not know—but have reason to believe—has been altered through witness coaching. Moreover, regardless of the breadth of the interpretation of “knowingly,” Rule 3.3(a)(3) and Standard 3-6.6 would not touch prosecutors that inadvertently engage in Grade Three witness coaching. The exclusion of unknowing conduct from the language of this rule may encourage prosecutors to remain ignorant about the techniques they use while preparing witnesses, so as to avoid being caught under the rule or standard.<sup>102</sup> Furthermore, Rule 3.3(a)(3) and Standard 3-6.6 would not apply to prosecutors who engage in Grade Four witness coaching, in which they present false testimony that they have knowingly altered under the good-faith belief that the witnesses have been mistaken in their accounts.

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99. MODEL RULES OF PROF'L CONDUCT r. 1.0(f).

100. Standard 3-6.6 states that a prosecutor “should not offer evidence that the prosecutor does not reasonably believe to be true, whether by documents, tangible evidence, or the testimony of witnesses. When a prosecutor has reason to doubt the truth or accuracy of particular evidence, the prosecutor should take reasonable steps to determine that the evidence is reliable, or not present it.” ABA CRIMINAL JUSTICE STANDARDS, § 3-6.6.

101. Flowers, *supra* note 98, at 1013–14.

102. *Id.*

## 2. Rules Lacking an Intent Requirement

Several ABA rules fail to provide an intent requirement and thus may arguably cover unintentional Grade Three witness coaching and intentional (but in good faith) Grade Four witness coaching, in addition to intentional Grades One and Two. However, the rules and standards lack specificity, making it unclear which precise conduct is prohibited. The rules and standards discussed below are too vague to provide prosecutors with any substantial guidance in this area.

First, Rule 8.4(c) deems it professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>103</sup> Here, the ABA failed to provide the requisite intent for a violation of the rule, and courts have been inconsistent in their analysis of the rule.<sup>104</sup> While it is clear that the rule captures at least knowing conduct involving “dishonesty, fraud, deceit or misrepresentation,”<sup>105</sup> more clarity is needed to give sufficient guidance to prosecutors and other attorneys.

Next, Rule 8.4(d) prohibits an attorney from engaging “in conduct that is prejudicial to the administration of justice.”<sup>106</sup> It is unclear whether witness coaching would constitute professional misconduct under ABA Rule 8.4(d) because of the rule’s vague and ill-defined language.<sup>107</sup> However, a prosecutor who engages in improper witness coaching, resulting in false testimony and obstructing the criminal justice system’s pursuit of the truth, likely falls within the rule’s purview.<sup>108</sup> Again, however, the rule fails to provide a requisite intent and thus it is unclear whether it prohibits all four grades of witness coaching.

ABA Rule 3.4(b) appears to be the provision most directly related to witness coaching. Rule 3.4 states that “[a] lawyer shall not . . . falsify evidence, [or] counsel or assist a witness to testify falsely”<sup>109</sup> and that “[a] lawyer shall not . . . request a person other than a client to

103. MODEL RULES OF PROF’L CONDUCT r. 8.4(c).

104. Flowers, *supra* note 98, at 1012–13 (“Courts have required knowledge, reckless disregard, and even gross or simple negligence.”).

105. MODEL RULES OF PROF’L CONDUCT r. 8.4(c).

106. *Id.* at r. 8.4(d).

107. Flowers, *supra* note 98, at 1013.

108. Carter, *supra* note 15, at 469–70.

109. MODEL RULES OF PROF’L CONDUCT r. 3.4(b). Concerning Rule 3.4(b):

It is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

*Id.* at r. 3.4(b) cmt.

refrain from voluntarily giving relevant information to another party.”<sup>110</sup> Rule 3.4 implies that “a lawyer may not induce a witness to give testimony that is not solely of her own accounting or to not give testimony that is relevant to the case;”<sup>111</sup> however, more clarity is necessary. The rule does not address the intent necessary to establish an ethical violation,<sup>112</sup> nor does it address the specific types of conduct that are prohibited.<sup>113</sup> The ABA has left these issues unattended.

### 3. *A Subset of Clear, But Narrow, Standards*

While a number of standards provide clearer guidance to prosecutors on how they should approach and interact with witnesses, the standards are especially narrow, applying only to either a small subset of witnesses or conduct. Thus, while providing greater guidance to prosecutors on certain conduct they must avoid in relation to certain witnesses, these standards do not extend to the vast majority of prosecutorial conduct or witnesses.

Standard 3-3.5 provides guidance to prosecutors regarding their relationships with expert witnesses.<sup>114</sup> The standard has two significant parts. First, “[a] prosecutor who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert’s opinion on the relevant subject,” and the prosecutor also “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>115</sup> Second:

The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the purpose of influencing the substance of an expert’s testimony. The prosecutor should not fix the amount of the fee contingent upon the expert’s testimony or the result in the case. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert’s testimony.<sup>116</sup>

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110. *Id.* at r. 3.4(f). This rule applies unless: “(1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.” *Id.*

111. Carter, *supra* note 15, at 469.

112. For example, is a prosecutor who unknowingly counsels a witness to testify falsely subject to discipline under Rule 3.4? How about a prosecutor who knowingly counsels a witness to alter the witness’s testimony, but unknowingly assists in falsifying the witness’s testimony?

113. For example, does a prosecutor who fails to stop a witness from testifying falsely in effect “assist” that witness to testify falsely, in violation of Rule 3.4?

114. ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION AND DEFENSE FUNCTION, § 3-3.5 (4th ed. 2015).

115. *Id.*

116. *Id.*

This standard is helpful, as it informs prosecutors what constitutes proper and improper conduct in relation to this special type of witness. Prosecutors should explain to the expert his role as an impartial witness and should not influence the expert's testimony through payment or other action. This standard, however, is only applicable to this small subset of witnesses.

Similarly limited is Standard 3-3.4, which attempts to guide prosecutors in their relations with victims and prospective witnesses. Standard 3-3.4(c) provides, "The prosecutor or the prosecutor's agents should seek to interview all witnesses, and should not act to intimidate or unduly influence any witness."<sup>117</sup> This standard is vague, as it fails to define the act of intimidation and unduly influence of witnesses. Furthermore, Standard 3-3.4 states:

The prosecutor should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses unless authorized by law, regulation, or well-accepted practice. All benefits to witnesses should be documented and disclosed to the defense. A prosecutor should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness's testimony.<sup>118</sup>

This implies that a prosecutor may not encourage a victim or witness to testify to what he believes the prosecutor wants to hear, by providing him with a monetary reward. The standard, however, does not address prosecutorial conduct that will encourage a witness to alter his testimony through means other than payment.

Standard 3-3.4(g) provides that when the law so requires, a prosecutor should "advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to independent counsel," but it also prohibits a prosecutor from advising a witness of these matters "with a purpose, or in a manner likely, to intimidate the witness, to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information."<sup>119</sup> This standard indicates that a prosecutor may not influence a witness's potential testimony by threatening to prosecute that witness in the future. Again, this standard applies only to a small subset of witnesses and conduct.

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117. *Id.* § 3-3.4(c).

118. *Id.* § 3-3.4(e).

119. *Id.* § 3-3.4(g).

Overall, the existing ABA Rules and Standards fail to draw a clear line between proper witness prepping and improper witness coaching. Moreover, the few standards that are clear on the conduct that is prohibited only cover small subsets of witnesses and conduct. These guidelines must be revised, or new guidelines adopted, to prohibit witness-coaching techniques that may improperly alter witnesses' testimony by means of the four grades of witness coaching.

### B. Case Law

The sparse case law on witness prepping and coaching appears to shed some light on the vague ABA Rules and Standards. Nevertheless, the current case law on witness coaching also fails to provide sufficient guidance to prosecutors on the conduct they must avoid—failing to distinguish between prepping and coaching. In addition to providing inadequate direction to prosecutors, courts have failed to implement proper safeguards for witness coaching.

#### 1. Failure to Draw a Clear Line

While courts have acknowledged that there should be a line dividing proper witness prepping from improper witness coaching, they have not clearly outlined which prosecutorial conduct is proper or improper.<sup>120</sup> Although some courts have attempted to provide standards for what is improper, these standards are either too vague or narrow to be effective.<sup>121</sup>

##### a. Unclear Guidelines for Witness Prepping

It is well known that a meeting between prosecutors and government witnesses to prepare for trial does not amount to improper witness coaching.<sup>122</sup> Moreover, case law suggests that rehearsal of a witness's direct testimony is permissible to prepare a witness for

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120. See *Skains v. Lockler*, No. CIV-S-06-127-LKK-CHS-P, 2009 WL 230037, at \*8 (E.D. Cal. Jan. 20, 2009), *aff'd sub nom. Skains v. California*, 386 F. App'x 620 (9th Cir. 2010).

121. See *id.* ("A thorough search reveals no Supreme Court or Ninth Circuit precedent on the constitutional boundaries of witness preparation. There appear to be no clearly established standards for evaluating a prosecutor's 'coaching' of witness testimony, assuming of course that the testimony is not perjured.")

122. See *id.* ("It is, of course, proper for an attorney to meet with a witness in preparation for trial."); *Nixon v. United States*, 703 F. Supp. 538, 563 (S.D. Miss. 1988) ("[P]retrial witness interviews are commonplace and are a proper method of trial preparation."); *aff'd*, 881 F.2d 1305 (5th Cir. 1989); *State v. Earp*, 571 A.2d 1227, 1234 (Md. 1990) ("Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses. A prudent attorney will, whenever possible, meet with the witnesses he or she intends to call.")

trial.<sup>123</sup> Courts, however, have not provided substantive guidance on what a prosecutor can and cannot do while interviewing or prepping a witness. While courts have indicated that attorneys must interview and prepare their witnesses before placing them on the stand,<sup>124</sup> they have failed to delve further to provide guidance as to what prosecutorial conduct is permissible and appropriate.

*b. Vague Standards for Witness Coaching*

While several courts have attempted to provide standards for witness coaching, they have failed to make them clear enough to be useful to prosecutors. Courts have indicated that witness coaching occurs when a prosecutor “seek[s] improperly to influence”<sup>125</sup> a witness’s testimony. It remains unclear, however, what “seeking improperly to influence” a witness’s testimony entails.

In *Geders v. United States*, the Supreme Court recognized that “[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it” and that a violation of applicable disciplinary rules “would constitute a most serious breach of the attorney’s duty to the court, to be treated accordingly.”<sup>126</sup> The Court, however, does not go on to define what attorney conduct would constitute an attempt to improperly influence a witness’s testimony.<sup>127</sup> Similarly, in *People v. Pulvino*, the Supreme Court of the State of New York, Appellate Division, stated that to find improper witness coaching, it is sufficient that there be “nonspecula-

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123. See *Smith v. Kelly*, No. 7:07CV00536, 2008 WL 345838, at \*11 (W.D. Va. Feb. 6, 2008) (“[I]t is not unusual or improper for witnesses to rehearse their direct testimony with counsel.” (citing *Daewoo Eng’g & Constr. Co. v. United States*, 73 Fed. Cl. 547, 573 (2006) *aff’d*, 557 F.3d 1332 (Fed. Cir. 2009))).

124. *United States v. Rhynes*, 218 F.3d 310, 319 (4th Cir. 2000) (“Thorough preparation demands that an attorney interview and prepare witnesses before they testify.”).

125. *Geders v. United States*, 425 U.S. 80, 81 (1976).

126. *Id.* Here, the Supreme Court addressed witness coaching in the context of defense counsel’s consultation with his client during an overnight recess in the trial. While this case discusses coaching by defense counsel during the trial stage, the broad principles announced are nonetheless relevant to this Note. The Court ultimately held:

To the extent that conflict remains between the defendant’s right to consult with his attorney during an overnight recess in the trial, and the prosecutor’s desire to cross-examine the defendant without the intervention of counsel, with the risk of improper “coaching,” the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.

*Id.* at 80. For a discussion of whether “prosecutors and defense attorneys have different roles in witness preparation,” see *Flowers*, *supra* note 98, at 1024.

127. *Geders*, 425 U.S. at 80; see also *Flowers*, *supra* note 98, at 1010.

tive evidence of any improper influence exerted on” a witness.<sup>128</sup> The court here also fails to indicate what conduct would exert an improper influence on a witness.<sup>129</sup> These standards are far too vague to provide helpful guidance to prosecutors on conduct that is impermissible witness coaching. Further clarity of what conduct will “improperly influence” witnesses’ testimony is needed in order to provide prosecutors with adequate guidance to avoid engaging in witness coaching.

Several Supreme Court cases provide weak insight into instances in which witness coaching may have or has occurred.<sup>130</sup> The cases suggest that courts may be suspicious of coaching when there is evidence that a witness’s testimony has changed significantly from the witness’s initial interview to the witness’s testimony at trial. Though the Supreme Court may be aware that prosecutorial conduct can cross the line from proper witness prepping to improper coaching and has begun to discuss what these improper techniques might entail, it has merely touched upon the issue and has failed to give adequate guidance to lower courts and prosecutors.

*c. Narrow Standards for Witness Coaching*

Other courts have provided standards that are much too narrow to effectively prevent the wide array of dangerous prosecutorial conduct that may alter a witness’s testimony. These standards prohibit only the most egregious conduct, such as directing witnesses to give perjured testimony or providing witness testimony that the prosecutor knows to be perjured.

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128. *People v. Pulvino*, 982 N.Y.S.2d 630, 632 (N.Y. App. Div. 2014) (citing *People v. Thompson*, 873 N.Y.S.2d 834, 836 (N.Y. App. Div. 2009)), *leave to appeal denied*, 992 N.Y.S.2d 807 (N.Y. 2014).

129. *See Smith v. Kelly*, No. 7:07CV00536, 2008 WL 345838, at \*11 (W.D. Va. Feb. 6, 2008) (“Smith provides no factual support for his conclusory allegation that the prosecutor improperly influenced the victim’s testimony. It appears from the brief mention of the incident in the trial transcripts that, during the pre-trial preparation, the prosecutor merely posed the questions to be asked at trial and Smith provides the court with no evidence to the contrary.”).

130. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 673 (2004) (suggesting that witness coaching occurred when evidence indicated that the prosecution explained to a key witness how to reconcile his testimony with his prior inconsistent statements and allowed his misstatements to stand uncorrected); *Strickler v. Greene*, 527 U.S. 263 (1999) (suggesting that the testimony of the government’s main witness had been substantially altered after a series of meetings and interviews with prosecutors and law enforcement officials but not explicitly denoting what occurred as improper witness coaching); *Kyles v. Whitley*, 514 U.S. 419, 442–43 (1995) (implying that the prosecution had improperly coached an eyewitness to murder, based on suppressed evidence and changes in the eyewitness’s testimony between the murder and trial); *see also Gershman, supra* note 53, at 24, 27.

In *State v. McCormick*, the court addressed witness preparation by defense counsel and found that “[n]othing improper has occurred so long as the attorney is preparing the witness to give *the witness*’ [sic] testimony at trial and not the testimony that the attorney has placed in the witness’ [sic] mouth and not false or perjured testimony.”<sup>131</sup> The language the court used suggests that as long as a lawyer does not feed testimony to a witness or direct him to give perjured testimony, the lawyer has not participated in coaching. This is a very narrow definition of witness coaching, which leaves permissible a large range of conduct that can influence a witness’s testimony.

Similarly, the court in *Skains v. Lockler* adopts a narrow standard of conduct constituting witness coaching. The court merely prohibited prosecutors from presenting testimony that they know to be false.<sup>132</sup> The Fourth Circuit explained that attorneys owe the court a duty of candor, forbidding them from knowingly “presenting perjured testimony,” counseling or assisting witnesses to commit perjury, and failing to disclose to the court when they believe that “a non-client witness is lying on the witness stand about a material issue.”<sup>133</sup> The court, however, failed to address conduct outside of the scope of knowingly aiding or encouraging perjured testimony.

The Eleventh Circuit provided a slightly broader approach to witness coaching, by expanding the scope of what is improper beyond assisting in or promoting a witness’s perjurious testimony.<sup>134</sup> The court defined coaching as “improperly directing witness’s testimony in such a way as to have it conform with, conflict with, or supplement the testimony of other witnesses.”<sup>135</sup> Despite its broader reach, the court’s definition is unsatisfyingly vague, as it fails to describe what conduct constitutes “improperly directing.” The court also failed to give an intent requirement, making it unclear whether Grades Three or Four conduct are prohibited. Lastly, the court focused only on coaching that is limited to the involvement of multiple witnesses.

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131. *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979).

132. *Skains v. Lockler*, No. CIVS06-127-LKK-CHS-P, 2009 WL 230037, at \*8 (E.D. Cal. Jan. 20, 2009) (“The presentation of a witness’ contradictory testimony is not improper absent the prosecutor’s knowledge that the testimony is false. . . . There appear to be no clearly established standards for evaluating a prosecutor’s ‘coaching’ of witness testimony, assuming of course that the testimony is not perjured.”), *aff’d sub nom.* *Skains v. California*, 386 F. App’x 620 (9th Cir. 2010).

133. *United States v. Rhynes*, 218 F.3d 310, 318 (4th Cir. 2000).

134. *Flowers*, *supra* note 98, at 1015–16.

135. *Crutchfield v. Wainwright*, 803 F.2d 1103, 1110 (11th Cir. 1986).

## 2. *Inadequate Safeguards Against the Effects of Witness Coaching*

In addition to failing to provide sufficient direction on how to prep witnesses, courts have failed to employ appropriate protections and remedies to deter witness coaching. This Section's discussion of remedies will be divided into two categories: remedies for instances in which coaching has been outwardly detected and instances in which coaching has remained undetected.

### *a. Where Coaching Is Detected*

In instances in which witness coaching has been discovered, courts have done little to remedy the damage. It has been uncommon for courts to order new trials or dismiss indictments as remedies for improper witness coaching in response to claims of due process violations,<sup>136</sup> ineffective assistance of counsel,<sup>137</sup> or prosecutorial misconduct.<sup>138</sup> The body of case law addressing safeguards for witness coaching indicates that courts currently view cross-examination as the most appropriate solution to guard against its harmful effects.<sup>139</sup> In the

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136. *See, e.g.*, *United States v. Welton*, No. CR-09-00153-MMM, 2009 WL 2390848, at \*3 (C.D. Cal. Aug. 1, 2009) (stating that that in order for witness coaching by a prosecutor “[t]o violate due process, governmental conduct must be ‘so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction’” (quoting *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991))); *Skains*, 2009 WL 230037, at \*8 (finding that petitioner’s “vague accusations” that the prosecutor coached witnesses did not demonstrate a due process violation).

137. *See Lewis v. State*, No. 45A04–0811–PC–675, 2009 WL 1332523, at \*4 (Ind. Ct. App. 2009) (unpublished table decision) (finding that Lewis’s counsel was not ineffective in its decision to decline to hire a child interview expert to provide expert testimony indicating that the child witness’s consistency in his statements confirms the conclusion that he was interviewed using suggestive questioning).

138. *United States v. Sayakhom*, 186 F.3d 928, 943 (9th Cir.), *amended by* 197 F.3d 959 (9th Cir. 1999) (holding that reversal on the basis of prosecutorial misconduct is “justified only if it appears more probable than not that prosecutorial misconduct materially affected the fairness of the trial”).

139. It appears as though courts have adopted the view that cross-examination is the proper safeguard for *all* instances of witness coaching, whether they occur during the early stages (e.g., first witness interviews) or during later stages of witness preparation. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 443 (1995) (stating that a “withering cross-examination” would have raised questions from the jury and affected the verdict); *Geders v. United States*, 425 U.S. 80, 80 (1976) (“The problem of possible improper influence on testimony or ‘coaching’ can be dealt with in other ways, such as by a prosecutor’s skillful cross-examination . . .”). *But cf.* *Cardona v. State*, 826 So. 2d 968, 969 (Fla. 2002) (per curiam) (ordering a new trial where the defendant had been sentenced to the death penalty and new evidence, which the defense could have used in cross-examination, emerged indicating that a key witness had been coached by the prosecutor). This case suggests that in cases in which *new and material* evidence arises indicating that a witness has been coached and the defense was unable to conduct a proper cross-examination during the trial, a court will order a

current state of case law, it is the role of the jury, rather than the court, to decide whether a potentially coached witness is reliable, by determining how much weight should be placed on a witness's testimony.<sup>140</sup>

If cross-examination is the standard safeguard against witness coaching in cases in which coaching has been detected, how confident should we be in the accuracy of verdicts in these cases? Ultimately, the effectiveness of cross-examination in any given case will depend on the defense counsel's ability to demonstrate that coaching occurred through cross-examination<sup>141</sup> and the jury's ability to consider coaching in its assessment of the witness.<sup>142</sup>

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retrial. However, it might also be the case that courts may be more willing to order a new trial in death penalty cases, in which the stakes are undoubtedly greater. It is interesting to note that none of these cases address witness coaching during the very early stages of litigation. It is quite possible that coaching during early witness interviews goes more readily undetected.

140. See *Geders*, 425 U.S. at 80 (providing the following examples by which harmful effects of coaching can be prevented: (1) a prosecutor's skillful cross-examination to discover whether "coaching" occurred during a recess; and (2) the trial judge's (a) directing "that the examination of witnesses continue without interruption until completed," or (b) otherwise arranging "the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption"); *United States v. Rhynes*, 218 F.3d 310, 320 (4th Cir. 2000) (stating that "if an attorney has inappropriately 'coached' a witness, thorough cross-examination of that witness violates no privilege and is entirely appropriate and sufficient to address the issue" (citing *Geders*, 425 U.S. at 89–90)); *Sayakhom*, 186 F.3d at 945 ("Cross-examination and argument are the primary tools for addressing improper witness coaching." (citing *Geders*, 425 U.S. at 89–90)); *State v. McCormick*, 259 S.E.2d 880, 882–83 (N.C. 1979) ("When a witness' [sic] testimony appears to have been memorized or rehearsed or it appears that the witness has testified using the attorney's words rather than his own or has been improperly coached, then these are matters to be explored on cross-examination, and the weight to be given the witness' [sic] testimony is for the jury.").

141. In instances in which witness coaching occurs at a very early stage (e.g., the first witness interview), it is very unlikely that improper prosecutorial witness coaching will be detected by or disclosed to defense counsel. Defense counsel may not be well versed in this area and may not be present during the witness interviews, making it difficult to detect subtle suggestions. See Gershman, *supra* note 15, at 833, 852; Wydick, *supra* note 8, at 22–23.

142. Research shows that jurors lack an understanding of how memory works. See Howe & Conway, *supra* note 25, at 545–46 ("Any number of surveys have found that most people have very little insight into how memory operates, and a number of authors have tried to dissuade laypeople about the many myths of memory. It is not just laypeople who are naïve when it comes to memory, but research has established that judges, jurors, and law enforcement personnel all too often rely on 'common sense' notions of memory rather than scientific facts." (citations omitted)).

*b. Where Coaching Remains Undetected*

Cross-examination may serve as an effective safeguard against the harmful effects of witness coaching in some instances, particularly in the most overt and egregious cases. However, in many of the more subtle cases, cross-examination will fail to reveal prosecutorial coaching.<sup>143</sup> There are many occasions in which it will be impossible for defense counsel to detect coaching, especially where the prosecutor and witness are themselves unaware that coaching has occurred.<sup>144</sup> Furthermore, most witness coaching occurs in a closed room with only the prosecutor and witness present, making it impossible for the defense to know about or uncover what is occurring.<sup>145</sup> It is because of these shortcomings that focus must be shifted to reforms that will reduce engagement in witness coaching (e.g., information and training sessions) rather than those that cope with instances of witness coaching after the fact (e.g., cross-examination).

*3. Sanctions*

In addition to implementing methods to remedy damage caused by witness coaching, sanctions must be employed in order to deter prosecutors from engaging in such detrimental conduct in the first place. While sanctions currently exist for prosecutors who knowingly influence a witness's testimony, they are not especially strong methods of deterrence because coaching often remains undetected. Presently, when prosecutors knowingly engage in Grades One or Two coaching, they are theoretically subject to discipline under ABA Rules 3.3(a) and 3.4(b), and may be subject to criminal punishment for subornation of perjury.<sup>146</sup> However, it is a rare occurrence for a prosecutor—or any lawyer—to be accused of coaching through either a criminal or discipline case.<sup>147</sup> Again, most prosecutorial coaching goes undetected because it almost always occurs without others present, which makes it nearly impossible to detect.<sup>148</sup> Moreover, prosecutors who knowingly engage in overt or covert coaching are unlikely to do so with other prosecutors around or with a witness that appears likely to report it.<sup>149</sup>

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143. See Gershman, *supra* note 15, at 854.

144. *Id.* at 855.

145. Wydick, *supra* note 8, at 22–23.

146. *Id.* at 21; see also 18 U.S.C. § 1622 (2013).

147. Wydick, *supra* note 8, at 23.

148. *Id.* at 23.

149. *Id.* at 23, 27.

On many occasions, uninformed prosecutors unknowingly engage in coaching. Prosecutors who participate in Grade Three witness coaching are not subject to discipline or criminal punishment, as such conduct lacks any corrupt intent required by the ABA rules or criminal statutes.<sup>150</sup> Furthermore, punishing prosecutors for Grade Three witness coaching would likely fail to deter unknowing coaching, because these prosecutors are unaware of what they are doing while they are doing it. Again, focus must be placed on informing prosecutors of the perils of suggestive interviewing techniques and how to avoid coaching witnesses.

#### 4. *With Insufficient Guidance, Where Should We Draw the Line?*

It is well established that prosecutors are permitted to interview and prepare their witnesses.<sup>151</sup> On the opposing end, it is relatively clear that prosecutors are prohibited from presenting testimony that is known to be false,<sup>152</sup> from seeking improperly to influence a witness's testimony,<sup>153</sup> and from placing false testimony in a witness's mouth.<sup>154</sup> Nevertheless, there are many areas between these two poles that the ABA and courts have left poorly defined. As the law currently stands, the majority of conduct in which prosecutors engage when equipping witnesses for trial is considered to be permissible prepping rather than improper coaching.<sup>155</sup> As a result, most of the conduct that

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150. *Id.* at 37.

151. See *Skains v. Lockler*, No. S-06-127-LKK-CHS-P, 2009 WL 230037, at \*8 (E.D. Cal. Jan. 20, 2009) ("It is, of course, proper for an attorney to meet with a witness in preparation for trial."), *aff'd sub nom. Skains v. California*, 386 F. App'x 620 (9th Cir. 2010); *Smith v. Kelly*, No. 7:07CV00536, 2008 WL 345838, at \*11 (W.D. Va. Feb. 6, 2008) ("[I]t is not unusual or improper for witnesses to rehearse their direct testimony with counsel."); *Nixon v. United States*, 703 F. Supp. 538, 563 (S.D. Miss. 1988) ("[P]retrial witness interviews are commonplace and are a proper method of trial preparation."), *aff'd*, 881 F.2d 1305 (5th Cir. 1989); *State v. Earp*, 571 A.2d 1227, 1234 (Md. 1990).

152. See *United States v. Rhynes*, 218 F.3d 310, 318 (4th Cir. 2000) (stating that ABA Rule 3.3 "forbids an attorney from knowingly presenting perjured testimony"); *Lockler*, 2009 WL 230037, at \*8 ("The presentation of a witness' contradictory testimony is not improper absent the prosecutor's knowledge that the testimony is false.").

153. *Geders v. United States*, 425 U.S. 80, 87 (1976); *Flowers*, *supra* note 98, at 744 ("The Supreme Court, in *Geders v. United States*, recognized that the lawyer must refrain from improperly influencing a witness's testimony but failed to define what constitutes improper 'coaching.'"); see also MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2002).

154. *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979) ("Nothing improper has occurred so long as the attorney is preparing the witness to give the witness' [sic] testimony at trial and not the testimony that the attorney has placed in the witness' [sic] mouth and not false or perjured testimony.").

155. *Flowers*, *supra* note 98, at 1015 ("Since the ABA Rules do not speak directly to the permitted or prohibited conduct of the lawyer when preparing a witness, 'there

causes alterations in witness testimony—and that thus should be prohibited—is considered to be appropriate and common practice. The line must be shifted to include additional conduct within the scope of witness coaching. Improper witness coaching must be clearly defined, so that prosecutors are aware of conduct from which they must refrain. A necessary reform, which will be proposed in Section IV.B below, is to describe prohibited conduct *in detail* in the ABA rules and criminal justice standards.

#### IV.

##### STRATEGIES FOR REFORM

Given the harmful effects of prosecutorial witness coaching and the likelihood that much of improper coaching will go undetected, reform in this area is necessary. There are many proponents of adopting a mandatory recording rule in which all witness interviews and meetings with prosecutors would be required to be taped.<sup>156</sup> However, this rule has several limitations and would ultimately fail to prevent the unknowing use of suggestive coaching techniques. Many instances of witness coaching arise because of a lack of education and guidance.<sup>157</sup> Accordingly, reforms must focus on providing appropriate guidance and implementing effective education programs in order to reduce unknowing occurrences of witness coaching.

##### A. *The Recording Rule*

A common proposal for reform in this area has been to record all interviews between prosecutors and potential trial witnesses.<sup>158</sup> Sup-

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remains a vast realm of conduct that could potentially be characterized as improperly seeking to influence a witness' testimony.'" (quoting Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 GEO. J. LEGAL ETHICS 389, 389 (1987)).

156. See Roberts, *supra* note 72; see also Gershman, *supra* note 15, at 861–62; George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 62 (2000) (arguing for a mandatory recording rule for pretrial ex parte communications between the government and cooperators as a prerequisite to admitting witness testimony of a compensated cooperator at trial).

157. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 953 (1999) ("Most prosecutors simply do not understand how memory works and the reality of truth."); see also Gershman, *supra* note 15, at 839, 843 ("Many prosecutors appear to be unaware of the extent to which they express verbally or non-verbally a genuine interest in certain facts, or communicate disappointment when the witness does not know particular facts, and thereby tip off the witness to what they want him to say. Some prosecutors are not subtle about this type of communicative message.").

158. See Gershman, *supra* note 15, at 861–62 (arguing that "all interviews with potential trial witnesses should be electronically recorded either by audio or videotap-

porters reason that recordings of witness interviews would reveal the use of suggestive interview techniques and any changes that occur within a witness's story over several interview sessions.<sup>159</sup> It has been argued that the exposure of witness coaching through the use of recordings would ultimately advance justice within the criminal system by reducing the likelihood of wrongful convictions.<sup>160</sup> The enforcement of a recording rule arguably may deter prosecutors from engaging in witness coaching, as prosecutors who act intentionally would face a much greater likelihood of getting caught and prosecutors who act unknowingly may think more carefully about their interview and prepping techniques.<sup>161</sup>

Hundreds of jurisdictions countrywide have implemented mandatory recording rules in the context of custodial interrogation, which have proven successful.<sup>162</sup> The recording of suspect interrogations has been adopted as a practice, despite the cost of time and expenses of using the equipment, paying employees to operate the equipment and observe interrogations, transcribing and storing tapes, and preparing the tapes and copies for use in the courtroom.<sup>163</sup> It can be argued that the recording rule in this context should be used as a model to implement a rule for prosecutors' interviews of witnesses. However, because of the differences between these two contexts, there are various additional costs that would likely arise from implementing a recording rule in the context of witness interviews and prep that do not arise in the context of suspect interrogations.

First, it would be impractical to record all meetings between prosecutors and every potential witness; this would mean that every encounter a prosecutor has in his office with an outside person should be recorded, as that person could possibly be needed to testify as a witness in a criminal trial. This would make a prosecutor's job incredibly burdensome and would prevent him from efficiently fulfilling his duties. Nevertheless, to effectively capture coaching, it would be nec-

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ing"); Roberts, *supra* note 72 (arguing that a recording rule should be adopted for all pretrial meetings with cooperating witnesses); Tortora, *supra* note 10, at 1536 (arguing that recording a witness's initial account of an event can help to detect and document any changes in the witness's testimony).

159. Gershman, *supra* note 15, at 862.

160. Roberts, *supra* note 72, at 289.

161. *Id.* at 293.

162. See, e.g., *False Confessions or Admissions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/False-Confessions.php> (last visited Nov. 15, 2015) (describing the prevalence of mandatory recording of police interrogations).

163. THOMAS P. SULLIVAN, NORTHWESTERN UNIV. SCH. OF LAW, CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 1, 23 (2004), [http://mcadams.posc.mu.edu/Recording\\_Interrogations.pdf](http://mcadams.posc.mu.edu/Recording_Interrogations.pdf).

essary to record every single meeting, as coaching can occur during any interaction.

Second, requiring this mandatory recording rule would be akin to requiring an open-file discovery policy regarding all government witnesses.<sup>164</sup> When an interview or meeting is documented by videotape, audiotape, or transcription, a prosecutor must disclose the recording to the defense pursuant to the Jencks Act and state discovery statutes.<sup>165</sup> While there undoubtedly are benefits to requiring prosecutors to disclose recordings of all witness meetings to the defense, there are many valid arguments for why all government materials should not automatically be disclosed. Releasing the identities of government witnesses—and, moreover, the specific testimony that the witnesses will most likely provide if the case proceeds to trial—provides defendants with the ability to harass, threaten, or even harm these individuals.<sup>166</sup> In order to maintain the functioning of the criminal justice system, it is imperative to preserve the safety of government witnesses. We would not be able to hold criminals responsible for their conduct without the help of these witnesses. It is important not to deter these individuals from coming forward and assisting the government.<sup>167</sup> In addition to the impracticality of requiring prosecutors to tape every encounter with every potential witness, an open-file discovery requirement, even if just for witness interviews and meetings, may be substantially burdensome for defense attorneys, who are already overworked and under-resourced.<sup>168</sup> Defense attorneys may have to sift through hours of recordings, which would likely require more resources than those available to most counsel.<sup>169</sup> Additionally, defense attorneys are not well versed in the science behind false memories, and it is unlikely

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164. Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 426 (2013) (“Open-file discovery is the idea that the prosecution should provide the defense with *everything* in the prosecution’s file—including witness statements and the names of witnesses, forensic evidence, and police reports. The defense would have access to this information without regard to the materiality of the evidence or the likelihood that the prosecution would introduce that evidence at trial.”).

165. Roberts, *supra* note 72, at 265–66.

166. Fox, *supra* note 164, at 449.

167. KERRY MURPHY HEALEY, DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES (1995), <https://www.ncjrs.gov/pdffiles/witintim.pdf> (“Intimidation of victims and witnesses undermines the functioning of the justice system by denying critical evidence to police and prosecutors. . . . Prosecutors and homicide investigators are now faced with crimes in which there are numerous known witnesses—and in many cases known perpetrators—but no one is willing to testify.”).

168. See Fox, *supra* note 164, at 434–35.

169. *Id.* at 437–38, 442–43.

that they would detect subtle suggestions, many of which occur through Grade Three coaching and which prosecutors themselves do not realize they are making.<sup>170</sup>

Third, for ethical reasons, prosecutors will likely need to inform witnesses that their conversations will be recorded, and witnesses will likely have to consent to being recorded.<sup>171</sup> A mandatory recording rule will likely deter witnesses from coming forward and testifying, as they may be hesitant to work with the prosecution if all of their meetings are to be recorded and preserved on videotape.<sup>172</sup> Some witnesses may find videotaping to be an intrusion on their privacy and may feel uncomfortable being videotaped. If a witness is tentative about participating in a criminal case to begin with, it is probable that he or she will decline to offer helpful information to the prosecution after hearing that all conversations will be recorded and documented.<sup>173</sup> Moreover, as discussed above, witnesses may decline to work with the prosecution out of fear for their own safety if they know that the defendants they are testifying against will have access to their testimony prior to trial.<sup>174</sup> Perhaps an exception could be created for witnesses who refuse to be recorded because they are either uncomfortable with being videotaped or fear for their safety. However, the creation of such an exception would likely end up swallowing the rule. If given an option, a witness would likely decline the recording. Furthermore, prosecutors who intentionally engage in coaching would likely evade the rule by presenting it in such a way that a witness will undoubtedly refuse to be recorded, or by failing to inform the witness about the rule and forging the witness's refusal.

An alternative to recording via videotape is the use of audiotape. Witnesses may view audiotaping as slightly less intrusive and intimidating, as their appearance will not be disclosed to the defendant and it

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170. Gershman, *supra* note 15, at 833, 852.

171. It is unclear from current sources whether or not a witness would have to consent to a prosecutor's videotaping of an interview. See 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 4:15 (Robert L. Haig ed., 3d ed. 2013) (discussing the ethical canons in the State of New York that require a lawyer to obtain a nonparty witness's consent before tape recording an interview); Carol M. Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 ST. MARY'S L.J. 661, 663 (2008) ("States' opinions as to whether it is ethical for an attorney to record a conversation without all parties' consent have not been uniform, and the issue has spawned a great deal of discussion. At one extreme are the states that prohibit secret attorney recording as unethical and, at the opposite extreme, are the states that permit secret attorney recording; others have taken positions somewhere between the two extremes.").

172. Bast, *supra* note 171, at 663 ("[M]any witnesses hesitate to speak freely if they know that their statements are being recorded verbatim.").

173. *Id.*

174. Fox, *supra* note 164, at 430–31; Roberts, *supra* note 72, at 296.

may be possible to alter a witness's voice. However, if the defendant knows the witness personally, these safeguards will end up being futile. Furthermore, audiotapes will fail to capture suggestive body language and gestures that influence testimony.

Another alternative to videotaping would be to require the recording of interviews and meetings through the mandatory taking and disclosing of notes.<sup>175</sup> This alternative, however, is just as problematic as audiotaping, as notes will not portray prosecutorial gestures and body language that may have influenced a witness's statements. Furthermore, unethical prosecutors can intentionally record false statements and ethical prosecutors can accidentally record false statements, as human error arises with note-taking.

At most, a recording rule for prosecutors' interviews of witnesses may deter bad apples from knowingly altering a witness's testimony or assisting in the provision of perjured testimony. An unethical prosecutor who wants to coach a witness is likely to engage in this conduct despite the implementation of such a rule.<sup>176</sup> These prosecutors will likely find an exception to the recording rule,<sup>177</sup> or will otherwise conceal the evidence. The implementation of a system of recording will not prevent prosecutors from inadvertently influencing witness testimony. Even if a recording rule is implemented, prosecutors will remain unaware of subtle and seemingly innocuous but harmful

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175. The Jencks Act already requires the mandatory disclosing of notes at some level. 18 U.S.C. § 3500(b) (2013) ("After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.").

176. See Fox, *supra* note 164, at 449–50 ("Open-file discovery would also present more subtle ways for prosecutors to frustrate defense counsel—specifically by misleading defense counsel into incorrectly thinking that the prosecutor has turned over all of the evidence or by overwhelming defense counsel with superfluous information."); Steven Koppell, *An Argument Against Increasing Prosecutors' Disclosure Requirements Beyond Brady*, 27 GEO. J. LEGAL ETHICS 643, 653 (2014) ("If some prosecutors were willing to violate their constitutional obligations and put their careers at risk, mandating open file disclosure is not going to stop them from still concealing the evidence.").

177. See Tim Cushing, *Why the FBI's New Interview Recording Policy Probably Won't Change Anything*, TECHDIRT (June 19, 2014), <https://www.techdirt.com/articles/20140609/10344327526/why-fbis-new-interview-recording-policy-probably-wont-change-anything.shtml> (discussing the shortcomings of a recording rule for custodial interrogations because of exceptions for unavailable or dysfunctional equipment, "public safety," and "national security" and "intelligence, sources, or methods").

techniques.<sup>178</sup> While the recording of witness interviews may have its benefits and may become more feasible in the future, this reform is currently neither the most practicable nor efficient way to create change within the system. Before resorting to a costly and burdensome recording rule, this Note proposes reforms that will attempt to reduce the number of instances of witness coaching, as well as alleviate the need for a system of detection. Ultimately, what prosecutors need is to be informed about the dangers of witness coaching and given guidance on the suggestive conduct from which they should refrain.

### *B. My Proposals*

While the recording of witness interviews by prosecutors may serve as a potential *ex post* solution by allowing for the detection of witness coaching and the possibility of remedying the effects of coaching, such a requirement would prove costly and ineffective for deterrence purposes. Instead, our focus should be placed on providing prosecutors with clearer guidance on impermissible conduct, implementing education and training programs for prosecutors, and enforcing those programs. In addition to guidance and trainings, courts should adopt a test for evaluating the admissibility of testimony that appears to be influenced by coaching.

#### *1. Clearer Guidance*

The model ethics rules, specifically, those that apply to prosecutors, must be revised to provide clear guidance, and states must follow suit by revising their own ethics codes. Professor Flowers proposes the following for the Prosecution Function of the Criminal Justice Standards:

When preparing a witness to testify, whether at trial, deposition, grand jury hearing, or any other hearing, a prosecutor should refrain from any conduct that may intentionally or unintentionally encourage, assist, or request a witness to testify falsely. In considering how to prepare a witness to testify, the prosecutor should consider whether the method the prosecutor is using unintentionally conveys to the witness that he should testify to facts other than what the witness, individually, believes to be true. The prosecutor should not:

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178. It can be argued that each recording should be reviewed in detail by a prosecutor along with an expert on the matter in order that the prosecutor learn which of his commonly used techniques are harmful and should be avoided. However, this method is neither consistent with the purpose of the recording rule nor feasible.

1. discuss with a witness the law or defenses in the case before obtaining the witness's complete statement. Even after the witness has given a complete statement, in writing or orally, the prosecutor should not attempt to influence the witness's testimony by explaining the defendant's theory of what happened or the requirements of the law.<sup>179</sup>
2. in a case in which identity is an issue, disclose to a witness any information about the current appearance of the defendant, unless extraordinary circumstances would require it.
3. prepare two or more witnesses together unless extraordinary circumstances would require it.
4. after the court has ordered sequestration of witnesses, disclose to a witness what previous witnesses have testified about. This would not preclude a prosecutor from asking about factual issues that have arisen based on the testimony of other witnesses but the prosecutor should not imply that other witnesses have testified differently than what the witness has previously indicated he or she would testify about.<sup>180</sup>

This proposed standard provides greater guidance on what prosecutors should and should not do when interacting with a witness. The phrasing of this standard as to which conduct constitutes witness coaching is significant, as prosecutors need further specific guidance on what *not* to do.

Some beneficial additions to Flowers's proposed standard would include provisions stating that the prosecutor should not<sup>181</sup>:

5. ask a witness leading questions.
6. provide positive or negative feedback, or make facial or body gestures that can be inferred as feedback, after the witness has made a statement.
7. provide a witness with any additional facts about the case.
8. falsely tell a witness that pertinent items of information have been established by other evidence.
9. repeat a question again and again, after the witness has clearly answered it.

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179. It should be noted that this standard might appear to stilt the conversation and relationship between the prosecutor and the witness. Nevertheless, there are other ways for prosecutors to build rapport with witnesses. The curbing of the dangers that a reveal of the defendant's theory or the law's requirement may have on a witness's testimony ultimately outweighs the strain that may be placed on the prosecutor and witness's conversation.

180. Flowers, *supra* note 98, at 1026.

181. Many of the following additions are based on scientific findings on memory suggestions and are common examples that Drs. Charles J. Brainerd and Valerie F. Reyna have encountered in criminal cases. See BRAINERD & REYNA, *supra* note 7, at 229.

10. expose a witness to evidence about which the witness will later be asked to testify.
11. ask closed-ended questions (e.g., specific, multiple-choice, or yes-no questions), unless all other means of questioning have been exhausted.<sup>182</sup>

In addition to providing guidelines on what a prosecutor should not do, it is crucial to educate prosecutors about good interview and preparation techniques in order to help guide them toward the use of accurate techniques and away from the above suggestive techniques. The following proposed standards provide guidance to prosecutors on how to interview and prepare their witnesses, without crossing the line to improper witness coaching.

When interviewing a potential witness, a prosecutor should<sup>183</sup>:

1. build rapport with the witness using neutral conversation and make the witness feel comfortable.<sup>184</sup>
2. establish ground rules with the witness; the prosecutor should instruct the witness that the witness should always tell the truth, that the witness should not answer a question if the witness does not know the answer, and that the witness should tell the prosecutor when the prosecutor is wrong.<sup>185</sup>
3. encourage the witness to freely recall the event in question.<sup>186</sup>
4. assess the witness's account of events in an objective manner to ascertain how accurate and credible it is. Before the inter-

182. Marche et al., *supra* note 70, at 268 (“However if it is necessary to follow up with closed-ended questions in order to obtain details that have not yet been reported, interviewers must avoid using suggestive or leading questions and introducing information that has not been provided in the current interview.”).

183. This proposal is based on recommendations found in several different interview guidelines and are supported by scientific studies on memory and suggestibility. *Id.*; see also HOME OFFICE & DEP’T OF HEALTH, *ACHIEVING BEST EVIDENCE IN CRIMINAL PROCEEDINGS: GUIDANCE ON INTERVIEWING VICTIMS AND WITNESSES AND USING SPECIAL MEASURES* (2007); Colin Clarke et al., *Interviewing Suspects of Crime: The Impact of PEACE Training, Supervision, and the Presence of a Legal Advisor*, 8 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 149 (2011).

184. Marche et al., *supra* note 70, at 268 (“Building rapport has a beneficial impact on interviews, with research showing that the more comfortable the interviewee feels, the more information she or he is likely to provide.”); see also RONALD P. FISHER & R. EDWARD GEISELMAN, *MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW* (Charles C. Thomas ed., 1992); CLAIRE WILSON & MARTINE POWELL, *A GUIDE TO INTERVIEWING CHILDREN: ESSENTIAL SKILLS FOR COUNSELLORS, POLICE, LAWYERS & SOCIAL WORKERS* (2001).

185. Marche et al., *supra* note 70, at 268; see also Debra A. Poole & Jason J. Dickinson, *Investigative Interviews of Children*, in *CHILD FORENSIC PSYCHOLOGY: VICTIM AND EYEWITNESS MEMORY* 157 (Robyn Holliday & Tammy Marche eds., 2013).

186. Marche et al., *supra* note 70, at 268 (“Free recall allows interviewees to expand on points they feel are most relevant, giving control of the interview to the interviewee. Encouraging elaboration at the beginning of the interview promotes more elaborated responses to further questioning during later stages.”).

view, a prosecutor should learn about the witness's background and any potential motive the witness may have to lie. A prosecutor should carefully inquire into these areas, but only if it is possible to do so without implying an anticipated response.<sup>187</sup>

5. ask the witness open-ended questions before closed-ended questions.<sup>188</sup>
6. briefly summarize the witness's statements at the end of the interview, *using the witness's language*, and instruct the witness to correct the prosecutor if what the prosecutor says is wrong or incomplete.<sup>189</sup>

When preparing a potential witness to testify at trial, a prosecutor should<sup>190</sup>:

1. instruct the witness to only tell the truth as he knows it and to say if he does not remember something.<sup>191</sup>
2. explain to the witness how courtroom procedures will work, including where the witness will be sitting and the order in which the witness will be questioned by prosecutor and defense counsel, with the exclusion of details about the defendant such as where the defendant will be sitting and what the defendant will be wearing.<sup>192</sup>
3. practice the witness's direct examination by formulating specific questions for trial and having the witness provide his answers. A prosecutor should encourage the witness to use his own words at all times and should only guide the witness's responses to the extent the witness is rambling, providing confusing or unclear responses, or violating the rules of evidence.<sup>193</sup>

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187. Gershman, *supra* note 15, at 856.

188. Marche et al., *supra* note 70, at 268 ("There is general consensus in the scientific and professional community that open-ended questions should be used whenever possible because open-ended questioning promotes more accurate recall than specific, multiple-choice, or yes-no questions.").

189. *Id.* at 268–69 ("Finally, closing the interview with a recapitulation allows for the interviewee to substantiate the interviewer's accuracy and may lead to further memory retrieval."); see also HOME OFFICE & DEP'T OF HEALTH, *supra* note 183.

190. This proposed standard is for prosecutors who have already interviewed and obtained the witness's account of events. It is a condensed version of Professor Gershman's proposed protocol for witness preparation based mainly on his experience as a prosecutor and includes methods that are supported by scientific findings. See Gershman, *supra* note 15, at 856–59.

191. *Id.* at 856.

192. *Id.* at 857.

193. *Id.* at 857–58. Note that Professor Gershman uses the word "rehearse," while the proposed standard intentionally uses the word "practice." The word "rehearse" connotes the idea of scripting the witness's testimony, which should be regarded as improper conduct.

4. be cautious when attempting to reconcile inconsistencies within the witness's testimony. A prosecutor may review a witness's prior statements with the witness, but should avoid this where possible. A prosecutor should refrain from providing a witness with his or her prior testimony to study,<sup>194</sup> and should never suggest to the witness what the witness should say.<sup>195</sup>
5. conduct a mock cross-examination with the witness by anticipating the points defense counsel will likely focus on, including the witness's criminal background, potential motives for testifying, and discrepancies in the witness's prior testimony or statements. A prosecutor should make sure that the witness is able to explain or correct the discrepancies, but should avoid reconciling the discrepancies himself.<sup>196</sup>

## 2. Training Programs

In addition to the adoption of clearer guidelines, prosecution offices on both the state and federal level should implement extensive training programs for their prosecutors.<sup>197</sup> This Section will first describe what such a training program would entail and will then discuss mechanisms that can be used to enforce these training programs within prosecution offices.

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194. I concede that this is a tough standard. Nevertheless, where possible, witnesses should be focused on their account of the event, rather than on what they may have said at an earlier point in time. Prosecutors must be careful when the prior witness statements that they possess have come from law enforcement's notes or forms, as law enforcement agents may make mistakes in their written recordings. Reviewing these statements with a witness could result in the witness falsely altering his or her testimony to conform to that "prior statement."

195. See Gershman, *supra* note 15, at 858.

196. *Id.* at 858–59. Prosecutors must be made aware that conducting mock cross-examinations can potentially amount to instances of unknowing Grade Three witness coaching. Nevertheless, it is important for witnesses to understand how cross-examination works before being thrown on the witness stand. Thus, when conducting mock cross-examinations with witnesses, prosecutors must exercise extreme caution in their interactions and questionings. Prosecutors should be sure to emphasize to the witness that none of the questions they will ask are suggestive of how the witness should or should not answer. Prosecutors should again stress to the witness that the witness should only tell the truth.

197. Researchers have emphasized the importance of training interviewers and the continuation of their training over time. Marche et al., *supra* note 70, at 270; see, e.g., MICHAEL E. LAMB ET AL., TELL ME WHAT HAPPENED: STRUCTURED INVESTIGATIVE INTERVIEWS OF CHILD VICTIMS AND WITNESSES (Graham Davies & Ray Bull eds., 2008); Emily S. Hill & Graham M. Davies, *Has the Quality of Investigative Interviews with Children Improved with Changes in Guidance? An Exploratory Study*, 7 POLICING 1, 2–19 (2013); Poole & Dickinson, *supra* note 185; Alexis E. Rischke et al., *Using Spaced Learning Principles to Translate Knowledge into Behavior: Evidence of Investigative Interviews of Alleged Child Abuse Victims*, 33 J. POLICE & CRIM. PSYCHOL. 58 (2011).

*a. The Program*

Training programs should focus specifically on teaching prosecutors how to properly prepare a witness and how to avoid impermissible conduct that may influence or alter a witness's account of events. The implementation of training programs for prosecutors should be mandatory because this issue is so important to the truth-seeking function of the criminal justice system. Focusing resources on educating prosecutors about the subtle and common, but undoubtedly avoidable, tactics that can amount to drastic changes in a witness's testimony will be an important step in reducing the occurrences of coaching.<sup>198</sup> While training sessions may not prevent coaching by prosecutors who knowingly and intentionally alter witness testimony, prosecutors who unknowingly engage in such behavior can become more cognizant of their actions. Training programs will reduce Grade Three witness coaching, including instances of coaching by prosecutors who are conscious of their conduct but are unknowledgeable or in disbelief about the grave miscarriages of justice that can result, as well as instances of coaching by prosecutors who are altogether unaware that they are engaging in suggestive behavior. Training programs will also reduce Grade Four witness coaching by educating prosecutors on how to handle cases in which they know or believe that their witnesses are mistaken in their accounts.

Training programs should be implemented in two stages: (1) for new prosecutors when they join the office and (2) for all prosecutors as part of their mandatory continuing legal education. The first stage would consist of an intensive training for entering prosecutors that would take place during their first three months in the office. These trainings would occur through lectures, demonstrations, and mock exercises led by supervising prosecutors. Individual lectures should be given pertaining to specific techniques to use and avoid when working with identification, child, elderly, and cooperating witnesses. Universal manuals should be written to elaborate on the guidance that is provided through the revised ethics rules. Furthermore, as part of the trainings, prosecutors should be taught the following method of analysis proposed by Professor Wydick, which will allow them to check the appropriateness of their questions or statements before speaking them out loud during a witness interview or preparation session:

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198. Wydick, *supra* note 8, at 38 ("What is needed now is a method of analysis that will give a lawyer reasonable latitude when interviewing and preparing a witness, yet will minimize the risk to the quality of the witness's testimony.").

Step One: Will my next question or statement overtly tell this witness that I want him to testify to something I know is false? If so, I could be disciplined or criminally sanctioned. If not, then—

Step Two: Will my next question or statement send a covert message to this witness that I want him to testify to something I know is false? If so, I could be disciplined or criminally sanctioned. If not, then—

Step Three: Is there a legitimate reason for my next question or statement to this witness? If there is no legitimate reason, then I should not ask the question or make the statement. If there is a legitimate reason, then—

Step Four: Am I asking the question or making the statement in the manner that is least likely to harm the quality of the witness's testimony? If not, then I should change my approach.<sup>199</sup>

As an addition to the training sessions, new prosecutors should be supervised during witness interviews and preparation meetings throughout their first year in the office. Supervised witness preparation will provide new prosecutors with further guidance, allowing them to get real-life feedback and amend their practices before being sent out on their own to conduct interviews. During these meetings, the supervising prosecutor should stop the line of questioning if he sees that the junior prosecutor is embarking on a line of improper questioning. This will allow supervising prosecutors to prevent occurrences of witness coaching whenever possible. If the supervising prosecutor is unable to stop the coaching before it occurs, he should have the duty to document the behavior that occurred and disclose it to defense counsel. This will help new prosecutors become aware of their impermissible conduct, while allowing for disclosure of the suggestive behavior.

The second stage of training would be for all prosecutors through continued legal education (CLE). CLE requirements should be amended to include a specific focus on the topic of witness preparation. Prosecutors must continue trainings to refresh themselves on proper preparation techniques and suggestive tactics they must avoid. Furthermore, every office should have an expert who knows the scientific literature on memory and suggestibility intimately, is heavily trained in identifying conduct that may alter witnesses' accounts of events, is able to assess witness interviews critically, and comes in every six months to perform spot checks on the prosecutors in the

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199. Wydick, *supra* note 8, at 38–39. For further elaboration on legitimate reasons for asking a question or making a statement to a witness, see *id.* at 17–18.

office. Continued supervision and review of prosecutors' conduct is critical.

With the mandatory enforcement of this training program in every prosecution office throughout the country, prosecutors could no longer validly plead ignorance with regard to the conduct in which they engage while interviewing and preparing their witnesses. The instances of witness coaching that prosecutors could once argue were conducted unknowingly, should now fall under a presumption that the prosecutor in question had knowledge of his improper conduct and its harmful effects, subjecting him to discipline under the revised ethics rules.

*b. Internal Enforcement*

Prosecutorial Ethic Enforcement Units (PEEUs) should be created to enforce these new programs within prosecution offices. PEEUs would oversee the implementation of guidance and training programs in prosecution offices. Furthermore, these units would investigate incidents of improper witness coaching and other prosecutorial misconduct involving witnesses. The PEEUs should be modeled after the internal affairs divisions of law enforcement agencies.<sup>200</sup>

On the federal level, there should be a central PEEU within the Department of Justice (DOJ), with smaller branches for each district. Each branch would be responsible for overseeing and investigating prosecutorial misconduct, including improper witness coaching, within its own office and would report any problems or ethical violations to DOJ's central division. On the state level, there should be a central PEEU within each state for the state's prosecution offices. Within each county's prosecution office, an internal supervisor should be appointed to work closely with the state's PEEU.

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200. See, e.g., OFFICE OF THE ATTORNEY GEN. OF N.J., INTERNAL AFFAIRS POLICY & PROCEDURES (2014), [http://www.nj.gov/oag/dcj/agguide/internalaffairs2000v1\\_2.pdf](http://www.nj.gov/oag/dcj/agguide/internalaffairs2000v1_2.pdf) ("The purpose of the internal affairs unit is to establish a mechanism for the receipt, investigation and resolution of officer misconduct complaints. The goal of internal affairs is to ensure that the integrity of the department is maintained through a system of internal discipline where an objective and impartial investigation and review assure fairness and justice."); *Department of Internal Affairs*, SCOTTSDALE POLICE DEP'T, <http://www.scottsdaleaz.gov/police/police-chief-alan-rodbell/departement-of-internal-affairs> (last visited Nov. 15, 2015); *Houston Police Department*, CITY OF HOUS., <http://www.houstontx.gov/police/contact/iad.htm> (last visited Nov. 15, 2015); *Internal Affairs Unit*, CITY OF DURHAM, <https://nc-durham.civicplus.com/180/Internal-Affairs-Unit> (last visited Nov. 15, 2015).

### 3. *Due Process Doctrine for Witness Coaching*

In addition to the above reforms, which are designed to reduce instances of coaching, a system must be implemented to remedy detected situations of improper witness coaching that cannot be prevented by clearer guidance and training programs. This Section proposes that courts establish a doctrine modeled after the test that has been adopted for the exclusion of eyewitness identifications. While this doctrine is not perfect, it is a helpful starting point for the area of prosecutorial witness coaching, in which there is no established doctrine and very little case law.

#### a. *Due Process and Eyewitness Identifications*

In a line of cases beginning in 1967 with *Stovall v. Denno*,<sup>201</sup> the Supreme Court has developed a due process analysis for eyewitness identifications. Today, there exists a two-step test to determine whether eyewitness identification should be excluded.<sup>202</sup> The first step consists of an analysis as to whether the identification procedure used was “unnecessarily suggestive.”<sup>203</sup> If the court finds that the procedure was not “unnecessarily suggestive,” the inquiry stops there and the identification will not be excluded. If the court finds that the procedure was “unnecessarily suggestive,” it will continue to the second step, which involves the court’s determination of whether the identification was nonetheless reliable.<sup>204</sup>

#### b. *Extension of Doctrine to Prosecutorial Witness Coaching*

The above two-step test for eyewitness identifications can easily be adopted for cases in which witness coaching has potentially influ-

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201. *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967).

202. *See Manson v. Brathwaite*, 432 U.S. 98 (1977).

203. *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (“Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.”).

204. *Id.* at 199–200 (determining, under the totality of the circumstances, whether an identification was reliable despite the procedure being suggestive, based on the following factors: “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation”). While it is outside the scope of this Note, the reliability factors discussed in *Biggers* need to be updated based on recent advances in social science. *See, e.g.,* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 468–75 (2012) (explaining how the *Biggers* Court’s reliability factors for eyewitness identifications are not supported by subsequent scientific findings).

enced testimony. Specifically, when presented with a defendant's challenge to the admission of witness testimony that he or she believes to be the product of witness coaching, courts should engage in the following two-step inquiry to determine whether the testimony should be admitted or excluded: (1) whether the interviewing or prepping procedure used was "unnecessarily suggestive" and, if so, (2) whether despite the use of "unnecessarily suggestive" procedures, the testimony is nonetheless reliable. The first step would rely on social scientists' expert testimony about interview and preparation techniques that are unnecessarily suggestive. The second step would be analyzed under a "totality of circumstances" test. A committee of social scientists should be created to determine a set of factors based on scientific findings that can be used to assess the reliability of witnesses' coached testimony.

#### CONCLUSION

Primo Levi once said, "Human memory is a marvelous but fallacious instrument. The memories which lie within us are not carved in stone; not only do they tend to become erased as the years go by, but often they change, or even increase by incorporating extraneous features."<sup>205</sup> Over the past forty years, scientific research has demonstrated this quotation to be true. The malleability of human memory has significant implications for the criminal justice system, in which individuals' lives often depend on witnesses' accounts of an event. Prosecutors have the ability, whether knowingly or unknowingly, to alter witnesses' descriptions of events through improper witness coaching before cases proceed to trial. While it is crucial for prosecutors to prepare their witnesses, they must be cautious not to cross the line by engaging in improper coaching. Currently, the model ethics rules and case law provide insufficient guidance to prosecutors on which conduct is permissible and which conduct constitutes improper witness coaching. This insufficient guidance encourages prosecutors to remain ignorant in their practice.

This Note proposes several reforms to reduce unintentional and unknowing occurrences of witness coaching by prosecutors. It recommends that the ABA Criminal Justice Standards be revised to offer clearer guidance to prosecutors on what constitutes proper witness prepping and improper witness coaching. It further recommends the implementation of mandatory training programs within prosecution

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205. PRIMO LEVI, *THE DROWNED AND THE SAVED* 1 (Raymond Rosenthal trans., 1988).

offices that would focus specifically on educating prosecutors about how to properly prepare witnesses and how to avoid impermissible conduct that may alter witnesses' accounts of events. It proposes the establishment of Prosecution Ethic Enforcement Units on both the federal and state levels to oversee the implementation of guidance and training programs in prosecution offices and to investigate incidents of improper witness coaching. These proposals focus on preventing prosecutors from unknowingly engaging in witness coaching, thereby reducing the amount of erroneous testimony given by witnesses. Lastly, in instances in which witness coaching was unable to be prevented, this Note provides for the development of a due process doctrine by which defendants can challenge the admission of witness testimony that potentially has been altered, in an attempt to remedy the harmful effects of witness coaching.