

CRIMINAL DEFENSE LAWYERING AT THE EDGE: A LOOK BACK

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“Criminal defense lawyers play close to the line. Prosecutors play in the center of the court.”¹

“Refusal to violate professional ethics—or even to approach as near to the line as humanly possible—is not professional misconduct.”²

I. INTRODUCTION

This Article is an attempt to reconstruct the story of a New York City lawyer’s professional death and resurrection. In particular, this is the story of John Palmieri’s defense of John J. Delane in the year 1915, a time in the history of the legal profession when the bounds of zealous representation, particularly in criminal cases, were blurry and in transition. This is also the story of what followed the *Delane* trial: the efforts of prosecutorial, disciplinary, and judicial authorities to resolve factual and legal uncertainties about Palmieri’s conduct and intentions in defending his client, their efforts to locate the line between a permissibly zealous defense and an improperly overzealous one, and their efforts to determine whether Palmieri’s conduct fell out of bounds. And this is, of course, an attempt to draw some lessons for today from the partially reconstructed story of a criminal defense lawyer who advocated “at the edge” (if not over it) close to a century ago.

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1. Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 617 (1999).

2. *Transcraft, Inc. v. Galvin*, 39 F.3d 812, 817 (7th Cir. 1994) (emphasis added) (citation omitted).

The story's broad outlines are simple. Palmieri's client, John Delane, is tried for receiving the proceeds of prostitution from one Jeannette Annette, based principally on the testimony of two prostitutes associated with her.³ Annette is not called to testify against Delane because the prosecutor cannot find her. But in the middle of the defense case, Annette makes an entrance, suitcase in hand. She says that she had been living in upstate New York where no one knew how to reach her; that she learned about Delane's trial from the previous day's newspaper; and that she got on the train the night before, arrived in the city early that morning, and, after wandering the streets, mustered up the courage to come to the courthouse to set the record straight.⁴ Palmieri knows that Annette is lying, both on direct-examination when she begins accounting for her dramatic appearance and on cross-examination when she elaborates, but he does not correct her, and in summation, he briefly presents a small part of her account as true, knowing it to be false. For doing so he becomes the target of both criminal and disciplinary proceedings.⁵

The more detailed version that follows proceeds first, with some background to the *Delane* trial, and then with the trial itself, the criminal investigation and prosecution, and the disciplinary proceedings. The story is based on the record of the disciplinary proceedings against Palmieri (which includes the record of the *Delane* trial),⁶ the briefs, and some contemporaneous newspaper accounts, as well as the judicial decisions. Among other things, the story raises questions of ongoing relevance about how lawyers should behave when it is unclear where the lines are drawn or when someone may later perceive that the lawyer crossed the line even if he did not. Equally, the story raises questions about how courts, prosecutors, and disciplinary authorities should regulate lawyers who act in these areas of uncertainty.⁷

3. Transcript of Record at 9-10, 60-61, *In re Palmieri*, 117 N.E. 1078 (N.Y. 1917) [hereinafter Transcript of Record] (on file with the Hofstra Law Review).

4. *Id.* at 10-11, 26-27, 500-01.

5. *Id.* at 8-12, 28-29.

6. Transcript of Record, *supra* note 3.

7. A theme of this Article—the difficulty of knowing—was amply reflected in the act of writing it. Time and again, inferences that I drew from the historical record were proven wrong as more evidence was adduced. Thus, I call this simply “an attempt to reconstruct” Palmieri’s story. Additional evidence would likely raise many additional doubts about the story. As an example of the difficulty in constructing this narrative: One of the main figures of Palmieri’s story was frequently referenced in accounts as either “John De Lane” or “John Delane.” For ease of reference, I have selected “Delane.”

II. BACKGROUND TO THE *DELANE* TRIAL

Palmieri's client, John Delane,⁸ was a minor Tammany politician⁹ and saloon keeper.¹⁰ He had come to America from Italy as a teenager, gone into business, and founded a political club named after himself.¹¹ A year-and-a-half before the trial, at age twenty-eight, Delane was shot by two gunmen while entering the clubrooms of the John J. Delane Association on Morris Avenue.¹² An account of the shooting noted that Delane's leadership among naturalized and American-born Italian-Americans had been established much earlier.¹³ Not until his arrest was it revealed that Delane himself had never become a United States citizen.¹⁴

A Bronx grand jury charged Delane on several counts relating to receiving the proceeds of prostitution, and Delane pled not guilty.¹⁵ Referred to in the press as the "Bronx White Slave case,"¹⁶ this was the state equivalent of a federal prosecution under the White-Slave Traffic Act.¹⁷ Congress passed that law, popularly known as the Mann Act, in 1910, to combat organized crime groups that were believed to be kidnapping young women in Europe and selling them into sexual slavery in America.¹⁸ The federal law was then used to prosecute cases, including some celebrated ones, having little to do with that law's original purpose.¹⁹

8. Delane's true name was John De George. He was indicted as "John De George, alias John De Lane." Transcript of Record, *supra* note 3, at 313.

9. *White Slave Plot to Free Politician Goes 'Higher Up'*, N.Y. HERALD, Apr. 15, 1915, at 8.

10. Transcript of Record, *supra* note 3, at 311.

11. *Shoot Young Leader as He Enters Club*, N.Y. TIMES, Nov. 18, 1913, at 5.

12. *Id.*

13. *Id.*

14. *Palmieri Gives Bail on Two Indictments*, N.Y. TIMES, Apr. 22, 1915, at 7 [hereinafter *Palmieri Gives Bail*].

15. Transcript of Record, *supra* note 3, at 312.

16. *See, e.g., Palmieri Gives Bail*, *supra* note 14.

17. 18 U.S.C. §§ 2421-2424 (2000).

18. *Id. See generally* DAVID J. LANGUM, *CROSSING OVER THE LINE: LEGISLATIVE MORALITY AND THE MANN ACT* 15-47, 65-68 (John C. Fout ed., 1994) (providing background information to the passage of the Mann Act and referencing legislative history showing that the intent of the Act was to the stop trafficking of white women across state lines for prostitution); Anne M. Coughlin, *Of White Slaves and Domestic Hostages*, 1 BUFF. CRIM. L. REV. 109, 109-13, 124 (1997) (stating that the Mann Act was enacted to stop debauchery and commercial trafficking of women and claiming that a United States Immigration Commission report regarding the kidnapping of European women to be sex slaves in the United States played a "significant" role in the passage of the Act).

19. *See generally* LANGUM, *supra* note 18, at 48-76 (discussing various cases in which courts have deviated from the main purposes of the Mann Act).

Delane's indictment grew out of a federal investigation. After securing the criminal convictions of two men, Antonio Ross and Joseph Mirabella, in 1914, the federal authorities handed their witnesses over to the Bronx District Attorney, Francis Martin.²⁰ Martin used the witnesses' testimony to secure separate indictments against Delane and another defendant, Benjamin Sabbatino.²¹ The local press followed Delane's case.²²

Palmieri entered the case shortly before the trial, which began on the morning of March 9, 1915 with the selection of a jury. Although Palmieri and Delane did not know each other, it was not surprising that Delane sought Palmieri's help. It is true that Palmieri was not among the ranks of the elite lawyers who populated the city's corporate law firms and controlled its representative organization—the Association of the Bar of the City of New York, widely known as the City Bar. But the elite lawyers did not defend criminal cases. Palmieri, on the other hand, was well known among criminal defense lawyers and within the city's Italian community, and, in his early forties,²³ he was at the height of his professional career.²⁴

Palmieri was born outside of Naples, Italy.²⁵ His widowed mother brought him as a child to New York City, where he grew up on the lower east side of Manhattan, attending public schools, City College²⁶ and law

20. See *Palmieri Gives Bail*, *supra* note 14.

21. See *id.*

22. Transcript of Record, *supra* note 3, at 131-36 (A New York City News Association reporter who covered the case testified that there was not much attention paid to the case by the downtown newspapers but that Delane "was pretty well known in the Bronx" and "was quite a politician there.").

23. Compare *Palmieri for City Bench*, N.Y. TIMES, July 19, 1904, at 14 (reporting Palmieri as being forty years old in 1904) with *John Palmieri, 64, A Former Justice*, N.Y. TIMES, Nov. 6, 1937 at 17 (reporting Palmieri's age as sixty-four at his death in 1937).

24. See, e.g., *Hearst Won't Run for Office Again*, N.Y. TIMES, Apr. 18, 1909, at 20 (identifying Palmieri as one of the guests of honor at a dinner honoring William Randolph Hearst). A 1913 New York Times article suggests Palmieri's renown as a criminal defense lawyer. *Charlton Prepared Defense on Voyage*, N.Y. TIMES, Aug. 29, 1913, at 4. The article concerns the arrival of Porter Charlton, the son of a federal judge, in Italy after being extradited to face a criminal trial for murdering his wife, placing her body in a trunk, and sinking it in Lake Como. *Porter Charlton, Wife Slayer, Here*, N.Y. TIMES, Jan. 27, 1916, at 22. The 1913 article refers to the effort of Charlton's father to retain Palmieri, along with famous Italian advocates, to defend his son and notes that Palmieri may have to decline the engagement in order to return to the United States to defend an Italian accused of killing a New York policeman. *Charlton Prepared Defense on Voyage*, N.Y. TIMES, Aug. 29, 1913, at 4.

25. *Palmieri for City Bench*, *supra* note 23.

26. *John Palmieri, 64, A Former Justice*, *supra* note 23.

school,²⁷ and gaining admission to the bar in 1891.²⁸ He established a solo and, then, two-person law practice,²⁹ in which he specialized in defending members of the Italian immigrant community. Early in his career, he also served briefly as a deputy attorney general in voting fraud cases.³⁰ He ran unsuccessfully several times in the Bowery for the Assembly and the Board of Aldermen on the Republican ticket,³¹ and was generally engaged in progressive politics, opposed to Tammany's control of city government and to the influence of big corporations.³²

In the late summer of 1904, based on the recommendations of prominent judges and others,³³ Governor Benjamin B. Odell, Jr., appointed Palmieri to the City Court to replace a recently deceased Justice until an election could be held in November to fill the vacancy.³⁴ Palmieri was later reported to be the first Italian-born citizen to become a judge in the United States and his appointment was celebrated in his community.³⁵ Palmieri subsequently received the Republican nomination for the judgeship, but he was regarded as unqualified by the City Bar, and he was defeated for the position by the Democratic candidate, who the bar association also declined to approve.³⁶ Although Palmieri's service as a judge lasted only a few months, he would be referred to as Judge Palmieri or ex-Judge Palmieri throughout his later career.

Palmieri returned to law practice after leaving the bench. His most sensational criminal representation was in the 1906 trial of seventeen

27. Palmieri's obituary lists him as attending New York University School of Law. *Id.* An earlier article identified him as having attended the New York Law School. *Palmieri for City Bench*, *supra* note 23. In the early or mid-1890s, before being admitted to the bar, Palmieri was an "office boy" in the employ of a law firm, Connoly, Lewinson & Mack, and may in fact have read for the bar. Transcript of Record, *supra* note 3, at 259.

28. Transcript of Record, *supra* note 3, at 138. The Appellate Division decision mistakenly records his admission as 1901. *In re Palmieri*, 162 N.Y.S. 799, 800 (App. Div. 1916), *rev'd*, 117 N.E. 1078 (N.Y. 1917).

29. The firm, Palmieri & Wechsler, was located in the World Building in lower Manhattan. Transcript of Record, *supra* note 3, at 139. The earliest decision referring to the firm is in 1904, but a 1900 decision reflects Palmieri's association with Martin Wechsler. *See Stefanini v. Sroka*, 88 N.Y.S. 167, 167 (App. Div. 1904); *Gobbi v. Associazione Fraternal Itallianna*, 65 N.Y.S. 672 (App. Div. 1900).

30. *See, e.g.*, *People v. Acritelli*, 110 N.Y.S. 430, 433, 438 (App. Div. 1908).

31. *Palmieri for City Bench*, *supra* note 23 (reporting that Palmieri ran twice as the Republican nominee for Assembly and in 1903 for Alderman).

32. *See, e.g.*, *City Ownership League to Attend Conference*, N.Y. TIMES, Aug. 31, 1905, at 4.

33. Transcript of Record, *supra* note 3, at 248.

34. *Palmieri for City Bench*, *supra* note 23.

35. *John Palmieri, 64, A Former Justice*, *supra* note 23.

36. *Trounstine v. Britt*, 106 N.E. 129, 130 (N.Y. 1914); *Bar Association Acts on Judiciary*, N.Y. TIMES, Oct. 12, 1904, at 5.

year-old Josephine Terranova for stabbing to death her sexually abusive uncle and her aunt.³⁷ Palmieri's successful insanity defense was marked by the clash of alienists and other medical experts.³⁸

As Palmieri's criminal practice developed, the practice of law and the regulation of lawyers in New York were in transition. Although the state judiciary had always been responsible for admitting lawyers to the bar, for a long time it had no effective way to police the lawyers it admitted. At the end of the nineteenth century the state courts handed responsibility to the recently-formed bar associations to investigate and prosecute disciplinary charges. With the adoption of the ABA Canons of Professional Ethics in 1908 and their endorsement by the New York State Bar Association the next year, the organized bar in New York had an explicit (if not entirely clear) set of professional expectations on which to premise disciplinary charges.³⁹

Efforts to reform the bar mirrored broader public efforts to reform state and local government, including the judiciary, and the City Bar was involved in many of these efforts. The professional elite held state court practitioners, particularly criminal practitioners, in low esteem, in part because of corrupt trial lawyers whose stock-in-trade included suborning perjury and hiding witnesses. For example, when Palmieri entered the profession, William F. Howe of the Howe & Hummel law firm, once one of the most successful and corrupt lawyers of the mid-to-late 1800s, was a recent memory, and the law firm itself continued.⁴⁰ Until the organized bar stepped in, it was largely the job of criminal prosecutors to police corruption among lawyers, but the corps of city prosecutors was itself less than exemplary. Not until William Travers Jerome took office as the Manhattan District Attorney in 1902 did the tradition of district attorneys who were independent of the party bosses, police, and powerful private citizens begin to take root in New York City.⁴¹

37. This trial was resurrected from obscurity in a fascinating account of the case and its significance by Jacob M. Appel. Jacob M. Appel, *The Girl-Wife and the Alienists: The Forgotten Murder Trial of Josephine Terranova*, 26 W. NEW ENG. L. REV. 203, 203, 205-09 (2004).

38. *Id.* at 210-14.

39. Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 283 (1993).

40. See RICHARD H. ROVERE, *HOWE & HUMMEL: THEIR TRUE AND SCANDALOUS HISTORY* 152-54 (1947); Molly A. Guptill, Note, *The More Things Change the More They Stay the Same: Mr. Tutt and the Distrust of Lawyers in the Early Twentieth Century*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 305, 313 (2004).

41. See generally RICHARD O'CONNOR, *COURTROOM WARRIOR: THE COMBATIVE CAREER OF WILLIAM TRAVERS JEROME* (1963) (discussing the career of William Travers Jerome in the District Attorney's office and the political circumstances of New York at the time); Allen Steinberg,

At any time, criminal defense practitioners have to contend with appearances of guilt by association with their clientele and run the risk of being falsely accused of wrongdoing by clients who are trying to better their own lot. Add to this that prevailing standards of the times made such accusations all the more plausible, and to this, add the brass-knuckles style of practice in New York City criminal courts of Palmieri's day, and it becomes hard to imagine that any criminal defense lawyer would avoid occasional run-ins and suspicions.

Certainly, Palmieri was not the exception. For example, in 1899, a legislative investigation of Tammany government looked into dismissals of murder cases in which an assistant district attorney's son and Palmieri represented criminal defendants. Palmieri reportedly failed to show up to answer questions.⁴² In 1907, a year after the *Terranova* trial, Palmieri figured peripherally in a political corruption scandal, when Aldermen in a minority party (the Municipal Ownership League) who were expected to support Palmieri for the position of Recorder took bribes to throw their votes to another candidate.⁴³ Palmieri also had the occasional reported tussle with a fellow lawyer or judge.⁴⁴

More seriously, Palmieri's name figured in a 1911 murder trial as an alleged accessory. The defendant, Romeo Magnotti, had escaped from Staten Island to Italy in 1903 before he could be tried, and years later, he returned to the United States, was captured in Ohio, and was returned to face the music.⁴⁵ Magnotti testified that right after the murder, Palmieri harbored him at his Manhattan home, helped him to escape, and corresponded with him for the next five years. Palmieri refused to testify on confidentiality grounds but acknowledged that Magnotti had been to his house and that they had corresponded.⁴⁶

Magnotti's allegations were little noticed initially but became an issue a year later when the Bull Moose Party nominated Palmieri as its

The "Lawman" in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York, 34 U. TOL. L. REV. 753 (2003).

42. *Mazet Committee's Work*, N.Y. TIMES, Nov. 29, 1899, at 14.

43. *Two Aldermen Held in Bribery Scandal*, N.Y. TIMES, Feb. 2, 1907, at 3; *see also Alderman in Deadlock Over the Recordership*, N.Y. TIMES, Jan. 8, 1907, at 5.

44. *See* N.Y. *ex rel.* Palmieri v. Marean, 83 N.Y.S. 843, 843-44 (App. Div. 1903) (vacating a fifty dollar contempt fine against Palmieri in a Manhattan civil trial for refusing to sit down when the judge ordered him to do so); *Lawyers in a Spat*, N.Y. TIMES, Mar. 9, 1908, at 3 (describing a verbal exchange in which Palmieri appeared ready to "come to blows" with another lawyer over the question of which of them represented the defendant).

45. *Bull Moose Pawing into Palmieri's Past*, N.Y. TIMES, Sept. 16, 1912, at 5.

46. *Id.*

candidate for State Attorney General.⁴⁷ A Brooklyn newspaper published a transcript of Magnotti's testimony and the party commenced an investigation.⁴⁸ Palmieri charged that those who had resurrected the story in an attempt to force him off the ticket were engaged in ethnic bias.⁴⁹ In his defense, Palmieri produced letters from the District Attorney and from Magnotti's lawyer saying that Magnotti had lied and that Palmieri had done nothing improper.⁵⁰ The Bull Moose Party committee appointed to investigate concluded that Palmieri had been wrongly accused.⁵¹

Whatever attacks may have been leveled at Palmieri up to the date of the *Delane* trial, he weathered them all.⁵² And even more than that, as later events made clear, Palmieri was widely regarded as an honest lawyer. When later obligated to answer disciplinary charges arising out of the *Delane* trial, Palmieri presented testimonials to his good character from almost fifty current and former judges and public officials, including the former Governor and the district attorneys of four New York City counties.⁵³

III. THE *DELANE* TRIAL

According to Palmieri's later account, Delane's first lawyer, William J. Kier,⁵⁴ came to him a few days or weeks before the trial to ask him to defend the case.⁵⁵ The matter of Palmieri's fee was not resolved until the day before the trial,⁵⁶ at which point Palmieri invited Delane to his office on Park Row, near the lower Manhattan courthouses, to discuss the evidence. Delane had already lined up

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Believe Roosevelt Is Losing Ground*, N.Y. TIMES, Sept. 29, 1912, at 3.

52. See Transcript of Record, *supra* note 3, at 139 (Palmieri testified that until the *Delane* case, he had never been charged by a bar association or court).

53. *Id.* at 246-95.

54. Kier, who represented Delane when he answered the indictment in the case, had a prior association with Delane. See *infra* note 96.

55. Transcript of Record, *supra* note 3, at 139-40. According to Palmieri, Kier told him "that this case was considered in the Bronx as one of the most important cases to be tried." *Id.* at 140.

56. *Id.* at 142-43 (Palmieri initially quoted a \$500 fee but Delane came up with only \$200 and Palmieri declined to proceed until the remainder was produced. Palmieri eventually relented for an additional \$50.).

character witnesses and Palmieri considered that there was little else to do, since the case was just a question of fact for the jury.⁵⁷

Delane's alleged victim was one Jeannette Annette, also known as Henrietta Annette, and later referred to by both sides in the Palmieri disciplinary proceedings as "the Annette woman."⁵⁸ The Bronx District Attorney, Francis Martin, planned to show that Delane and Annette had been living in a succession of Bronx apartments for some years under the names "John Annette and Jeannette Annette," while Delane's wife lived in an apartment elsewhere in the Bronx, and that Annette supported Delane, paying their rent with the proceeds from prostitution. The prosecutor's office gave notice before the trial that the chief accusing witnesses would be two other prostitutes who would testify that one night, more than a year earlier, they saw Annette take a roll of dollar bills from her stocking and give it to Delane.⁵⁹ Annette herself was not scheduled to testify; she was absent from the trial. The District Attorney's office had hidden her for a time but she had run off and the prosecution could not find her. The District Attorney was unable to tie her absence to Delane.

Delane denied receiving money from Annette and attributed the prosecution to the elected District Attorney's political animosity.⁶⁰ Delane said Annette would support his account and showed Palmieri two signed statements from Annette attesting to Delane's innocence.⁶¹ Delane said he knew where to find Annette. She had gone upstate to get away from the District Attorney. Delane kept in touch with her and sent her money. Palmieri directed Delane to telephone Annette and summon her back to New York City.⁶²

Annette came to Palmieri's Coney Island, Brooklyn home the next morning, March 9, 1915, the first day of the trial. She came early because Palmieri had to leave by 8:30 a.m. to be at the Bronx courthouse when jury selection began at 10:00 a.m.⁶³ She was carrying her suitcase.

57. *Id.* at 47, 49.

58. *Id.* at 43, 45, 48-50, 82.

59. *Id.* at 82-83, 319-20, 324.

60. *Id.* at 141 (Palmieri testified that Kier told him that Delane headed a political association with over 1000 members, "that there existed between him and Mr. Martin some political animosity, and [that] he felt that this indictment was merely spite work on the part of Mr. Martin.")

61. *Id.* at 50-51. One of the statements denied giving money to Delane and said that if Annette had made any contrary statements it was because the prosecutors "frightened [her] and [she] thought they would send [her] to prison if [she] did not make the statements they wanted [her] to make." *Id.* The other was to the same effect. *Id.*

62. *Id.* at 144.

63. *Id.* at 46-47.

Supposedly, she had arrived early that morning on the overnight train from Amsterdam, which was near Mayfield, the small upstate town where she said she was rooming.⁶⁴ Palmieri's housekeeper,⁶⁵ Giovanna Sanna, showed her into the library and brought her tea.

Annette was waiting when Palmieri entered his library at 7:30 a.m. and they spoke briefly.⁶⁶ Annette said she would testify that she had never given Delane money from prostitution. Although Palmieri knew that Annette had made a contrary statement to the Bronx prosecutor, Annette denied that she had testified to the grand jury.⁶⁷ Had he known that she had, Palmieri later said, he would never have called Annette as a witness.⁶⁸

The prosecution's case took less than a day. District Attorney Martin made an opening statement and then, as promised, called a handful of witnesses. The star witnesses were two prostitutes, "comrades or associates" of Annette, who testified that they saw Annette give Delane money. One of them, Stella Brophy, said that for two years, she and her own male friend (going by the name of Mr. and Mrs. Marble) shared various Bronx apartments with Annette and Delane.⁶⁹ The other prostitute, Margie Miller, stayed with them at the apartment for a short while.⁷⁰ The women testified that on January 10, 1914, a date more than a year earlier, they went downtown to go "hustling," returned to the Bronx around 1:00 a.m. the next morning, met Delane, and returned to the apartment on East 153rd Street.⁷¹ After Jeannette changed into a kimono, she returned to where the others were waiting, said, "I had a good night," removed from her stocking a roll of bills with a \$10 bill on

64. *Id.* at 46, 144; Appellant's Brief at 3, *In re Palmieri*, 117 N.E. 1078 (N.Y. 1917) [hereinafter Appellant's Brief]. It may well be that Annette was hiding out elsewhere, including in New York City.

65. She was generally referred to as Palmieri's "servant" or "maid." *See, e.g.*, Transcript of Record, *supra* note 3, at 224.

66. *Id.* at 47, 55.

67. *Id.* at 53, 146, 195-96. Evidently, there was a requirement that the prosecutor disclose the grand jury testimony that led to the defendant's indictment, at least once all of the indicted defendants were apprehended. However, Delane had been separately indicted based on Annette's testimony and that of the other prostitute-witnesses. The prosecutor proceeded only on the latter charges. He did not feel obligated to disclose Annette's grand jury testimony, since Delane was not being tried on the indictment to which it had led. *Id.* at 144-45; *see also infra* notes 105-06 and accompanying text.

68. Brief for Respondent at 47, *In re Palmieri*, 117 N.E. 1078 (N.Y. 1917) [hereinafter Brief for Respondent].

69. Transcript of Record, *supra* note 3, at 320, 322-24.

70. *Id.* at 384.

71. *Id.* at 327-28, 386-90.

top, and gave the money to Delane, who observed, "I didn't think there was so much money in the world."⁷²

Two janitresses and a landlord of the Bronx apartments testified that Annette and Delane lived together as a married couple under the name Annette.⁷³ Two police detectives accounted for Annette's absence. They testified that while Annette was staying in a Bronx apartment, she went downstairs, had a whispered conversation with one Mrs. Mancini, went off with her, and had not been seen since.⁷⁴ One detective's attempt to locate Annette took him on an odyssey through New York City and to New Jersey, Pennsylvania, Kansas, and Tennessee.⁷⁵

After the prosecution rested, Palmieri made some motions and then asked for an adjournment until the next day in order to decide whether to present evidence.⁷⁶ The judge, County Judge Gibbs, directed Palmieri to give his opening statement that afternoon, and Palmieri gave a short one, to the effect that Delane had no obligation to put on a defense and that, although he had to consult with Delane, he was "prepared to try this case upon the People's own showing."⁷⁷ Then the judge adjourned the trial as requested.⁷⁸

Palmieri's evident indecision whether to present a case was probably all in show, since Delane had character witnesses lined up for the next day. But it is plausible that Palmieri would have equivocated over whether to call Annette as a witness. He was already in a position to argue, as he later did in his closing statement, that the prosecution's two accusing witnesses were not credible and that the prosecution had not proven Delane's guilt beyond a reasonable doubt. Or as Palmieri, interjecting his own credibility into the argument, would put it:

[T]hey are . . . brazen hussies; if you want to know my opinion, I wouldn't believe them under oath. If you want to know my opinion, they would just as well swear the Judge's life away, or my life away, as they would [Delane]

. . . .

72. *Id.* at 329; *see also id.* at 388.

73. *Id.* at 363-64 (Louise Nessling, janitress), 366-67 (Anna Knipe, janitress), 378-79 (Adolph Troeller, landlord).

74. *Id.* at 406-08.

75. *Id.* at 408.

76. *Id.* at 409-10.

77. *Id.* at 410-13; Appellant's Brief, *supra* note 64, at 1.

78. Transcript of Record, *supra* note 3, at 414-15.

No, no, gentlemen of the jury. God forbid that you can believe those women. God forbid that you believe those brazen hussies.⁷⁹

Of course, it would be good for the defense if Annette could credibly testify that she never gave Delane money. But the jury might discount or disregard her testimony, or even conclude the opposite, if it learned that Delane sent her money while she hid from the District Attorney and then summoned her back to the city for the trial, as Palmieri knew to be the case.

Palmieri met briefly with Annette a second time at his home the next morning, perhaps to test her credibility, perhaps to prepare her.⁸⁰ Their meeting could not have been long, since Palmieri again had to get to the Bronx by 10:00 a.m. Palmieri did not bring Annette to court with him; but by his account, he instructed her to go to court, where “she would be required as a witness.”⁸¹

Palmieri began the defense case later that morning by calling a parade of character witnesses, primarily business people who knew Delane from his saloon or from the John J. Delane Association, to attest to Delane’s reputation for morality, honesty, and fair dealings.⁸² On cross-examination, the prosecutor elicited one witness’s opinion that Delane’s saloon, Gilligan’s, also enjoyed a good reputation, which gave the prosecutor an opening to note that he had once ordered the police to close down the saloon.⁸³ In order to provide an explanation, other than the obvious one, for the absence of Delane’s wife, Wilhelmina, from the courtroom, Palmieri ended the morning by calling her physician to testify that Wilhelmina was unwell.⁸⁴

On the afternoon of the second trial day, Annette arrived in the courtroom, as she had arrived at Palmieri’s door a day-and-a-half earlier, carrying a suitcase. Palmieri started his questioning with what might have seemed like bland pleasantries, but they would become central to the later disciplinary inquiry. He began, “Where do you live?” Annette answered, “Now, I have no residence at all; I don’t live anywhere just at

79. *Id.* at 583-84, 596. With regard to the political incorrectness of the term “brazen hussies,” see Kenneth Lasson, *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 TENN. L. REV. 689, 706-07 (1996).

80. Transcript of Record, *supra* note 3, at 56-57 (Palmieri explained that he wanted to question Annette about why, if she was telling the truth, Brophy and Miller “had sworn the day before that they had seen her actually give money to Delane.”).

81. *Id.* at 57.

82. *See id.* at 415-64.

83. *Id.* at 452.

84. *Id.* at 464-74.

present.”⁸⁵ Evidently referring to the suitcase, Palmieri continued, “What did you have in your hand when you came in here?”⁸⁶ The prosecutor’s objection was sustained. Palmieri went on, “Where did you come from, Miss Annette?” Answer: “Why, I just came from Mayfield, New York.”⁸⁷ Question: “Where is Mayfield, New York?” Answer: “It is up the State; just how far it is, I couldn’t tell you.”⁸⁸ Question: “Is it near any great city?” Answer: “I don’t know that; I couldn’t tell you.”⁸⁹

And then came the seemingly innocuous, but fateful, question: “How did you get from Mayfield to New York?” And Annette’s answer: “Why, I came down on the New York Central & Hudson River; *I came down on the train last night*”—a lie. “I came down here,” she continued, “*because I read in the paper that Mr. De Lane’s case*”⁹⁰—the start of another lie, at which point Annette’s testimony was interrupted by an objection from the prosecutor: “I submit, your Honor, the witness be told to answer questions.” The trial judge sustained the objection; the question was repeated, “How did you get from Mayfield to New York?” Annette answered, “I came down on the train”⁹¹ and then the direct examination moved on to the essential aspects of her direct testimony: that she had been a professional prostitute (“a sporting woman”), beginning six or seven years earlier, nearly two years before she met Delane; and that she never supported Delane: “I didn’t give him any money at all” she insisted, “never at no time did I ever give him money.”⁹² She refuted the testimony of Brophy and Miller that she gave Delane a roll of bills from her stocking, calling their account “a lie.”⁹³

Palmieri closed by asking about Annette’s dealings with the prosecutor. She answered that Martin yelled at her, threatened her with jail, and tried to get her to change her story. Palmieri asked whether Annette told the prosecutor that Delane never gave her money, and she replied expansively:

I told him that, but he knew different; he knew lots of things and he had so many witnesses. Where are your witnesses? Bring them in and let them talk to me . . . they never seen nothing. Why don’t you bring

85. *Id.* at 474.

86. *Id.*

87. *Id.* at 475.

88. *Id.*

89. *Id.*

90. *Id.* (emphasis added).

91. *Id.*

92. *Id.* at 476-78.

93. *Id.* at 478-79.

them in and let me talk to them? That is why I came here today . . . *nobody knew where I was to bring me here, but I came anyway.*⁹⁴

Again, a lie. But Palmieri did not correct it. He passed the witness to the prosecutor.

It is easy to understand why Annette lied—namely, to shield Delane from damaging inferences from the fact that he had sent her money while she was hiding from the prosecutor. But it is impossible to know whether Palmieri played a role in scripting her lies and orchestrating her charade. The answer turns, to a large extent, on Palmieri's conversations with Annette and Delane, and of these, there is no reliable record and never was.

What is plain from the record is that Annette's participation did not help Delane. Having learned at some point that Palmieri would call Annette as a witness,⁹⁵ the prosecutor had armed himself with a transcript of her prior sworn grand jury testimony in which she admitted hustling for Delane.⁹⁶ Annette's explanation for implicating Delane under oath in the grand jury proceeding was that she had been afraid of the prosecutor.⁹⁷ Later, in the disciplinary proceedings, Palmieri's counsel would complain about the prosecutor's unseemly failure to warn Palmieri of the existence of the grand jury testimony before Palmieri called her to the stand: "[F]or the District Attorney to have led Mr. Palmieri into the trap of putting the Annette woman on the stand without telling him that she had been a witness before the Grand Jury was a breach of propriety, or at least of etiquette"⁹⁸

When cross-examined about how she came to be testifying at Delane's trial, Annette stuck to her previous story.⁹⁹ She brought out a clipping of a news story from the previous afternoon's *Evening Journal*, which, she said, had moved her to pack and catch the 11:09 p.m. train

94. *Id.* at 479-80 (emphasis added).

95. Whether Palmieri disclosed his intent to call Annette as a witness shortly before he did so or the previous evening was to become one of the few disputed facts in Palmieri's disciplinary hearing. *See infra* notes 164-67 and accompanying text. What seems certain is that, had he not decided to call Annette as a witness, Palmieri had no intention of disclosing her whereabouts to the prosecution, despite her obvious importance.

96. Transcript of Record, *supra* note 3, at 480-82. On cross-examination, Annette acknowledged that Delane had hired her a lawyer (whom Annette paid) when she was arrested for hustling. The lawyer, Kier, was the same one who Delane originally hired to defend him on the white slavery charges. *Id.* at 140, 493-95.

97. *Id.* at 482-83.

98. Brief for Respondent, *supra* note 68, at 28.

99. Transcript of Record, *supra* note 3, at 495-512.

from Amsterdam, New York the night before, arriving that very morning at 5:05 a.m.¹⁰⁰ The prosecutor questioned her effectively about how she had spent the time from then until her appearance in court. The prosecutor's questioning took over an hour, and the judge followed up, as Annette recounted carrying her suitcase up and down the city for hours that morning.¹⁰¹ The prosecutor drew out obvious lies, as Annette was unable to account plausibly for her whereabouts, although he did not elicit the whole truth—that she had arrived (at least) two days earlier in response to Delane's call. To put another nail in the coffin, the prosecutor later called, as one of his rebuttal witnesses, the proprietor, Mr. Griswold, of the Mayfield Hotel in Mayfield where Annette said she had been rooming, to testify that Annette had not departed the night before, as she claimed, but had not been seen for some time.¹⁰² Palmieri cross-examined Griswold to suggest that he might have been in error.

There was no love lost between Palmieri and District Attorney Martin; they had sparred throughout the case.¹⁰³ Palmieri felt he had been sandbagged by the District Attorney's failure to disclose that Annette had testified to the grand jury. Palmieri sought to put the prosecutor's conduct on trial, and in conclusion, called Martin as a surrebuttal witness. The trial judge expressed some doubts about the propriety of his doing so and warned Palmieri that he might be opening the door to prejudicial testimony.¹⁰⁴ The court then sustained objections to a line of questions designed to show that Martin had violated a law requiring the prosecutor to endorse the names of grand jury witnesses on the back of indictments, but allowed Martin to answer why Annette's name did not appear on the indictment.¹⁰⁵ Martin's answer, in a nutshell, was that he had initially indicted Delane based on Annette's testimony, but that after Annette disappeared, he secured the new indictment on

100. *Id.* at 499-501, 511.

101. *Id.* at 501-09. Palmieri later estimated that the prosecutor spent an hour and a half questioning Annette and that the judge added another forty-five minutes of questioning. *Id.* at 171.

102. *Id.* at 544-46. During his testimony, the proprietor referred to Annette as "Miller," the pseudonym Annette was using at the time. *Id.* at 549. The prosecution also called, as rebuttal witnesses, two federal agents who had brought Annette to the District Attorney's office the previous October, but they were not permitted to testify concerning Annette's statements, as the prosecutor planned. *Id.* at 558-62.

103. In summation, Palmieri took various swipes at Martin, observing that his treatment by the prosecutor "has been such as to discourage me to come into this court again." *Id.* at 594. Palmieri told the jury, "[a] public prosecutor must not be a persecutor." *Id.* at 599. The prosecutor responded in kind. *Id.* at 601-02; *see also infra* note 126 and accompanying text.

104. Transcript of Record, *supra* note 3, at 563.

105. *Id.* at 563-64.

which Delane was tried, based on the testimony of Annette's acquaintances. Along the way, Martin managed to slip in that Delane "had been her pimp for four years," and that when Annette was "spirited away," the prosecutor "proceeded to do the very best [he] could . . . to rid the county of one of the worst characters which [he] thought ever lived in this county."¹⁰⁶ Ultimately, the derogatory remarks were stricken by the trial judge, with the unsympathetic observation that if Delane was nevertheless prejudiced, "[he] brought it down upon himself by his counsel."¹⁰⁷

At the close of evidence, Palmieri offered to forgo summation,¹⁰⁸ explaining (in the jury's presence and, no doubt, for dramatic effect) that "this case is not even worthy of summation after the action of the District Attorney in this case."¹⁰⁹ Perhaps this reflected Palmieri's sense of the futility or difficulty of summing up, but that seems unlikely. Certainly, the judge regarded the remark as contemptuous and insisted on closing arguments, observing that "[e]very case where the rights of the defendant are at stake . . . is worthy of the best efforts, of the best eloquence of the best advocate."¹¹⁰ And ultimately, Palmieri asked for twenty to thirty minutes for his remarks.

Palmieri's principal theme was, do not believe any of them—not Annette, but also not the prosecution's two accusing witnesses—they are all "brazen hussies."¹¹¹ He argued that the witnesses' stories of seeing Annette hand Delane a roll of bills was implausible, as was their claim to have both been present when it happened, and both to have remembered it in the same way, but not to have discussed the case during the months leading up to the trial when the District Attorney was hiding them together in a flat.¹¹² This trial, Palmieri argued, was just "a fight between prostitutes."¹¹³ Delane was simply a customer, and while that was wrongful, he was not being prosecuted for that.¹¹⁴

And further, Palmieri argued, you can tell by looking at Annette that she was not a woman to be meekly exploited by a man like Delane:

106. *Id.* at 564-65.

107. *Id.* at 569-70.

108. *Id.* at 570.

109. *Id.* at 571.

110. *Id.*

111. *Id.* at 583-84, 596.

112. *Id.* at 581-82, 589.

113. *Id.* at 582.

114. *Id.* at 584.

This woman is no white slave in the sense that you and I understand white slaves to be. Do you believe, gentlemen of the jury, that that brazen hussy would have ever given away a dollar. You try to get a dollar from her and see if you can do it. You try it. Does she look like the kind of a woman that would take a roll of bills from her stocking and give it to him? Does she? Not that woman. No.¹¹⁵

And then, by Palmieri's own later admission, his rhetoric carried him over the edge. He continued:

It would be a different case here if you had an innocent, unsuspecting little girl without any experience . . . of the world It would be entirely a different thing, entirely different matter, but we have got her here, and thank God, gentlemen of the jury, that Divine Providence has brought that woman here. If it was the Evening Journal, I thank the Evening Journal. If it was anybody else—she said it was the Evening Journal that she read it in, and by the way, she produced a clipping to the Judge, if I am not mistaken; isn't that right, Judge?¹¹⁶

The judge answered, "Yes," and Palmieri concluded, "Thank God, I say, to the press."¹¹⁷ Of course, it had not been Divine Providence or the *Evening Journal* that brought Annette to court, as Palmieri well knew.

The jury was not moved by Palmieri's argument, not even enough to form a reasonable doubt. A few days later, the trial judge imposed a ten- to twenty-year prison term.¹¹⁸ Delane was shipped up to Sing Sing prison to begin serving his sentence.

IV. THE CRIMINAL INVESTIGATION

Moments after Annette left the courtroom, she was arrested for perjury,¹¹⁹ and Bronx District Attorney Francis Martin soon began investigating who may have helped her to hide from the prosecution and testify falsely on Delane's behalf. He established that the newspaper clipping that she had brought to court, the supposed impetus for her return from Mayfield to New York City, was from an afternoon edition that was not delivered to Mayfield. Annette was indicted for perjury and

115. *Id.* at 597.

116. *Id.* at 597-98.

117. *Id.* at 598.

118. *Id.* at 642. The sentence was subsequently modified to "not less than ten years, and the maximum not more than nineteen years and five months, so as to make your maximum term expire in the summer instead of the winter." *Id.* at 643.

119. *White Slave Plot to Free Politician Goes 'Higher Up'*, *supra* note 9.

held on \$25,000 bail.¹²⁰ Then Martin set out to secure her cooperation. He obviously was not interested primarily in Delane's role—Delane would soon begin serving a hefty sentence. Martin wanted to know who helped Delane—the bigger the fish, the better. There is, of course, no record of what the prosecutors told Annette's court-appointed lawyer to secure his client's cooperation, but no doubt, they pointed out that perjury convictions would be easy to procure.

Not everyone accepted the verdict, with its implicit repudiation of Annette's story. On March 24th, the former Coroner of the Bronx, a political foe of the District Attorney, brought charges before the Governor seeking Martin's removal.¹²¹ Among other things, he alleged that Martin had suborned the perjury of one "Henrietta Annette." Martin called the accusations a "joke" and said they were a response to hostility incurred in the course of prosecuting "white slavers."¹²² Evidently, lawyers of that day were not inhibited from using the media as a battleground.

Annette agreed to cooperate again with the prosecutors and signed a statement giving her account of how she came to lie at Delane's trial. She recalled being brought to Amsterdam, New York by a woman named Kitty Manzini in one newspaper account, and Mary Bull in another, to keep her from testifying against Delane after he was indicted.¹²³ The District Attorney, presumably relying on Annette's signed statement, told the *New York Times* that William Duer and his wife harbored her on her return and that Tony Fisher accompanied her to and from Palmieri's home on Ocean Parkway, Brooklyn.¹²⁴ Annette also stated that she remembered being served tea by Palmieri's housekeeper, who overheard some of their conversation. She claimed that Palmieri instructed her to lie and gave her the newspaper clipping.¹²⁵

Would District Attorney Martin have been reluctant to take a prostitute's word against a member of the bar? His summation to the *Delane* jury suggests, to the contrary, that he was happy to believe the worst of Palmieri. Martin had told the jury:

120. *Palmieri Gives Bail*, *supra* note 14.

121. *Seeks Removal of Martin*, N.Y. TIMES, Mar. 25, 1915, at 6.

122. *Id.*

123. *See Palmieri Gives Bail*, *supra* note 14 (noting that Kitty Manzini was indicted for her part in the conspiracy—taking Annette to Amsterdam, New York); *Writ Fails to Find Martin Witnesses*, N.Y. TIMES, Apr. 17, 1915, at 16 (noting that Mary Bull was held for her part in the conspiracy—taking Annette to Amsterdam, New York).

124. *Writ Fails to Find Martin Witnesses*, *supra* note 123.

125. *White Slave Plot to Free Politician Goes 'Higher Up'*, *supra* note 9.

[M]y opponent in this case has done what a lawyer of his kind generally does, who is familiar with the criminal law. He has lived a life in it; he has spent his whole life about the criminal courts, and with his familiarity of the criminal law, he has used the tactics of the criminal lawyer when he has no case, to get up and abuse his opponent no matter what that opponent may be. . . . [W]hile I have tried hundreds of cases, I have never seen one where such an utter disregard for Court and opponent was shown, as my opponent has shown in this case, but I say his custom of work in the criminal courts may have led him into that; it is something that I have never been used to, and I hope something that I never shall be used to. As prosecutor of this county, I have had to accept his abuse, and his insinuations from the beginning. . . . I have been elected by the people of this county to prosecute crime, and while God gives me strength to do it, I will do it to the best of my ability, and no man will ever question my motives, and no man ever has questioned my motives to this time, and I will stake my reputation against Judge Palmieri's, gentlemen.¹²⁶

Even so, the District Attorney needed to corroborate Annette's account. He could hardly expect a *jury* to believe her word over Palmieri's, though *he* might. So on Tuesday, April 13th, an assistant district attorney, two detectives, and a fourth man (a deputy sheriff or translator) accompanied Annette to Palmieri's house while he and his wife were out. Annette pointed out Giovanna Sanna, Palmieri's housekeeper, who was taken away, brought to court, and ordered held on \$1000 bail.¹²⁷

The next day, April 14th, Giovanna Sanna told the grand jury that Annette had visited Palmieri's home before she testified.¹²⁸ Evidently satisfied that this adequately corroborated Annette's testimony, the Bronx District Attorney asked the judge to remove Annette's case indefinitely from the trial calendar and to discharge her attorney. He released Annette's statement and predicted that several well-known people would be indicted.¹²⁹

Palmieri responded in the same forum. He called Annette's statement "a deliberate fabrication and a lie," and fumed that Martin's conduct "merits not only the severe condemnation, but the attention of

126. Transcript of Record, *supra* note 3, at 601-02.

127. *Accuses Palmieri in Big Perjury Plot*, N.Y. TIMES, Apr. 15, 1915, at 22.

128. *White Slave Plot to Free Politician Goes 'Higher Up'*, *supra* note 9 (The article refers to Palmieri's housekeeper as "Giovanna Sianna.")

129. *Id.*

competent authorities.”¹³⁰ The *New York Times* noted that Palmieri reserved his greatest outrage for how the prosecution treated his housekeeper, describing how a prosecutor and police had come to his home when only his employees and children were there, ordered one of his housekeepers to dress and threatened her with handcuffs if she did not come with them but never told her why, threatened the others not to tell Palmieri, his wife, or neighbors what had occurred, left his children in hysterics and left the others believing that Giovanna had been kidnapped.¹³¹ Palmieri concluded: “[a] more unwarranted and high-handed proceeding has never been witnessed. It was absolutely illegal from start to finish. If it had been indulged in by any but alleged officers of the law it would have promptly resulted in the arrest of those involved.”¹³²

Two days later, on April 16th, District Attorney Martin’s alleged use of abduction as an investigative tool became the subject of another proceeding.¹³³ The lawyer for the Duers, who were accused of harboring Annette, charged that the prosecutor had summoned the couple on Wednesday to testify “forthwith” before a grand jury that, as it turned out, was not sitting, and then tried to question them—an apparent abuse of the grand jury process.¹³⁴ When the Duers refused to answer, the prosecutor ordered them to return the next day, which they did. “They have not been seen since they entered the Grand Jury room,” the Duers’s lawyer told the judge, and he asked the prosecutor to account for their whereabouts.¹³⁵ The Assistant District Attorney insisted, “we haven’t got ‘em.”¹³⁶ But later that same day, the Duers’s attorney returned to court to announce that a detective had admitted holding the couple on District Attorney Martin’s order. Justice Brady issued a writ of habeas corpus directed at the District Attorney and instructed the Duers’s lawyer to seek a warrant in the Morrisania Court.¹³⁷

130. *Accuses Palmieri in Big Perjury Plot*, *supra* note 127.

131. *Id.* At Palmieri’s disciplinary hearing, the Assistant District Attorney, Seymour Mork, testified that he went to Palmieri’s house with two detectives, Annette, and an Italian interpreter, served Sanna “with a forthwith subpoena to appear before the Grand Jury, and so she would have no trouble finding it I took her in the car.” Transcript of Record, *supra* note 3, at 222-24.

132. *Accuses Palmieri in Big Perjury Plot*, *supra* note 127.

133. *Writ Fails to Find Martin Witnesses*, *supra* note 123.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

By that point, according to the *New York Times* account, “[p]ractically every lawyer and politician in the Bronx has been interested in the case.”¹³⁸ The next day, April 17th, Palmieri appeared before a Magistrate in the Morrisania court to complain that District Attorney Martin should stop trying his case in the press and that if he planned to charge Palmieri, he should do so already. The judge noted that the prosecutor did appear to be abusing judicial process and agreed to take the matter under advisement.¹³⁹

Four days later, on April 21st, the prosecutor obliged. Based on Annette’s testimony, a Bronx grand jury charged Palmieri in two separate indictments, one for suborning perjury and the other for conspiring to obstruct justice.¹⁴⁰ Palmieri took the charges seriously enough to come to the Bronx County Court to answer them accompanied by not only his wife but also the renowned criminal defense lawyer Max D. Steuer, one of the most skilled and successful trial lawyers of the day.¹⁴¹ Justice Brady released Palmieri on \$7500 bail, secured by a surety bond.¹⁴² The next day, Palmieri’s housekeeper, Giovanna Sanna, was indicted for perjury—apparently for testifying in the grand jury inconsistently with whatever statement she had previously given to the

138. *Id.*

139. *See To Summon Palmieri in Perjury Case*, N.Y. TIMES, Apr. 18, 1915, at 14.

140. *See Palmieri Gives Bail*, *supra* note 14.

141. *Id.* Steuer is still remembered for his successful defense in the homicide prosecutions arising out of the fatal Triangle Shirtwaist factory fire. *See* DAVID VON DREHLE, TRIANGLE: THE FIRE THAT CHANGED AMERICA 219-58 (2003). His cross-examination of the key prosecution witness has been immortalized in Francis Wellman’s classic, *The Art of Cross-Examination*. FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 50 (GARDEN CITY BOOKS 1948) (1903). Steuer was himself a subject of a disciplinary complaint and accusation of criminal misconduct a few years before he took on Palmieri’s defense. *Max D. Steuer Denies Erlanger Charges*, N.Y. TIMES, Dec. 5, 1912, at 3. Years later, the social and economic elite turned to Steuer when it was in trouble, but that is not to say that he won its acceptance. A 1933 *Time* article about Steuer’s retention by J.P. Morgan’s son to defend him on tax evasion charges suggests the ethnic biases of the time:

To extricate himself from such a simple episode. [sic] Banker Mitchell had need of no ordinary lawyer. He had already advised with such famed firms as Cravath, Degersdorff, Swaine & Wood and Davis. Polk. [sic] Wardell [sic], Gardiner & Reed. But even the most high-powered Manhattan legal talent agreed that there was only one thing to do: get slick little Crook-Defender Max D. Steuer, “greatest trial lawyer of our time.” A brilliant, inconspicuous, hawk-faced Austrian Jew, Max Steuer has defended George Graham Rice, tireless stock swindler; Maurice Connolly, Queens sewer grafter. Harry Daugherty, boss of the Ohio Gang; Max (“Boo Boo”) Hoff, Philadelphia underworld chief. He is the profession’s ablest exponent of the old legal saw for a weak case: “Try the judge, try your opponent, try the police but don’t try your client.”

Bona Fides, TIME, Apr. 3, 1933, available at www.time.com/time/printout/0,8816,753619,00.html.

142. *Palmieri Gives Bail*, *supra* note 14.

prosecutor.¹⁴³ Taking the offensive, Palmieri told the court that Sanna had been indicted only to discredit her as a witness in the criminal proceeding that he was thinking of bringing against the Bronx District Attorney.¹⁴⁴

After Palmieri answered the criminal charges, the Bronx prosecutor refused to disclose the conspiracy indictment or the grand jury testimony on which it was based, ostensibly because not all of the co-conspirators had been apprehended. Over the next three months, litigation ensued over whether Palmieri was entitled to examine the grand jury minutes in order to assist him in seeking to dismiss the indictments. Justice Brady granted Palmieri's motion, and, in June, the intermediate appellate court agreed.¹⁴⁵ Two days later, the District Attorney's office asked Justice Brady for permission to reopen the argument. It was reported that Steuer responded by accusing District Attorney Martin "of using threats and vilification to delay the court's proceedings."¹⁴⁶ Steuer complained:

Any time the District Attorney makes up his mind to ruin a man he will indict him with forty-nine others and then fail to apprehend one of the forty-nine He cares not whom he ruins. The District Attorney acts in anything but a professional and ethical manner, but who in the County of the Bronx can be so mighty as the District Attorney?¹⁴⁷

Some time after, in the first of two somewhat anticlimactic events in this story, the charges against Palmieri were dismissed¹⁴⁸ as were those against his housekeeper.¹⁴⁹ But District Attorney Martin then filed disciplinary charges against Palmieri,¹⁵⁰ thus shifting the focus from the

143. *Indicts Palmieri Servant*, N.Y. TIMES, Apr. 24, 1915, at 20. According to Assistant District Attorney Mork's later testimony, his office had subpoenaed her before a second grand jury "and already she had shown dangerous symptoms of having been coached; she declined to answer questions . . . and she made misstatements," whereupon she was indicted for perjury and held on \$7500 bail. Transcript of Record, *supra* note 3, at 224-25.

144. *Indicts Palmieri Servant*, *supra* note 143.

145. *People ex rel. Martin v. Brady*, 153 N.Y.S. 893, 894 (App. Div. 1915); *Palmieri Gains a Point*, N.Y. TIMES, June 12, 1915, at 20.

146. *Raps District Attorney*, N.Y. TIMES, June 30, 1915, at 9.

147. *Id.*

148. Transcript of Record, *supra* note 3, at 228.

149. According to Assistant District Attorney Mork, a decision was made not to try Sanna because her testimony had become unnecessary once Palmieri admitted having met with Annette at his home. *Id.* at 224-26. Annette eventually pleaded guilty to attempted burglary as a less serious offense, albeit one that she probably had not committed. She received a suspended sentence, and was recommitted to the county jail as a material witness in the prosecutor's case against Macini and others. *Id.* at 227-28.

150. *Id.* at 186-87; Appellant's Brief, *supra* note 64, at 5.

criminal to the disciplinary setting. The counter-charges against District Attorney Martin, however, went nowhere, and he emerged none the worse-for-wear. He continued as District Attorney (not without controversy¹⁵¹) until the end of 1920 when he was elected to the state Supreme Court, a trial level court of general jurisdiction.¹⁵²

V. THE DISCIPLINARY PROCEEDINGS AND THEIR AFTERMATH

Responsibility for the City Bar's disciplinary inquiry fell to its grievance committee. Einar Chrystie had served as counsel to the committee since 1902,¹⁵³ but the full committee examined Palmieri, interjecting with questions whenever its members saw fit.¹⁵⁴ Palmieri, with Steuer still beside him, admitted directing Delane to summon Annette to New York and meeting with her the day before she testified. But he denied putting her up to lie. On the contrary, he testified that his original plan was to elicit Annette's testimony that she had run away from the prosecutor, had been in communication with Delane, who supported her in hiding, and had been called back by Delane.¹⁵⁵ Palmieri denied that any of his questions were designed to elicit or bolster Annette's false testimony, and while he conceded knowing that some of her testimony was false, he said he believed that his duties to Delane foreclosed him from correcting her. Unpersuaded, the grievance committee voted to bring charges against Palmieri.¹⁵⁶

The court assigned the case to a referee, Judge Freedman.¹⁵⁷ The City Bar was represented by Thomas D. Thacher, whose father, the founder of Simpson, Thacher & Barnum (now known as Simpson, Thacher & Bartlett), had been a member of the City Bar committee that had disapproved of Palmieri's judicial candidacy more than a decade

151. See, e.g., *Gibbs and Martin Quarrel in Court*, N.Y. TIMES, Jan. 23, 1920, at 6.

152. Martin eventually became Presiding Judge of the Appellate Division, First Department in 1935 and served in that position until he died in 1947. See *Francis Martin, Jurist, Dies at 68*, N.Y. TIMES, June 2, 1947, at 25.

153. See GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970*, at 365 (1970).

154. Transcript of Record, *supra* note 3, at 54-55, 57 (questions by Chrystie, Sprague, Ottinger, Choate, and Davis); *id.* at 190 (Palmieri testified: "There were nine cross-examiners [in the grievance committee] . . . and I was there to satisfy them all, if I could. One man would ask a question, and then immediately another and another . . .").

155. *Id.* at 57, 169, 194-95.

156. *Id.* at 9, 17, 29, 201.

157. *Id.* at 4.

before.¹⁵⁸ Thacher relied primarily on Palmieri's deposition and the trial transcript, but also called as witnesses Assistant District Attorney Mork, Judge Gibbs, and others involved in the *Delane* trial.¹⁵⁹

Although Thacher believed that Palmieri had helped engineer Annette's false trial testimony, he was not going to call her as a witness to prove it.¹⁶⁰ Therefore, he presented narrowly crafted charges. His theory was that regardless of whether or not Palmieri had deliberately elicited Annette's lies, Palmieri had failed to correct Annette's lies on both direct and cross-examination, and his summation referred to a portion of Annette's false testimony. This in itself, Thacher argued, was serious misconduct.¹⁶¹ At the same time, Thacher would have been happy for the referee to infer that Palmieri's conduct had been far more culpable.

Palmieri, now represented by Howard Taylor,¹⁶² sought to dispel any inference that he had *intended* to elicit Annette's false story in her direct examination. He offered innocent explanations for the questions about her whereabouts and her suitcase that had prompted the beginning of her false tale.¹⁶³ He also sought to rebut any inference that he had *counseled* Annette to lie, and this led to the only significant factual dispute. Palmieri claimed that he told court officials and reporters after court adjourned on the first day that he would call Annette as a witness.¹⁶⁴ A reporter corroborated this account.¹⁶⁵ If this was true, it would be unimaginable that Palmieri would coach Annette to pretend that she did not decide until after the first trial day to come to the trial

158. See *id.* at 5; *Bar Association Acts on Judiciary*, *supra* note 36 (listing Thacher as a member of the City Bar Council); Christopher Gray, *A Remnant of a Midtown Full of Homes, Not Offices*, N.Y. TIMES, Feb. 6, 2000, at 7 (listing Thacher as one of the original founders of Simpson, Thacher & Barnum, now Simpson, Thacher & Bartlett).

159. See, e.g., Transcript of Record, *supra* note 3, at 199-205 (cross examination of Palmieri by Thacher with numerous references to trial transcript); see also *id.* at 209-12 (Thacher's direct examination of Assistant District Attorney Mork); *id.* at 229-31 (Thacher's direct examination of Judge Gibbs).

160. Annette was available, however, being held in jail as a material witness by the Bronx District Attorney, and compensated \$1 a day by the state. *Id.* at 227-28.

161. Respondent's Points at 1, 19-20, *In re Palmieri*, 117 N.E. 1078 (N.Y. 1917) [hereinafter Respondent's Points].

162. Among other things, Taylor had represented the City Bar in obtaining the disbarment of a clerk of the Howe & Hummel firm for improperly practicing under the firm's name after the one name partner was dead and the other disbarred. *In re Kaffenburgh*, 80 N.E. 570, 570-71 (N.Y. 1907).

163. Transcript of Record, *supra* note 3, at 168-71.

164. *Id.* at 163-65. Palmieri had previously so testified in the grievance committee proceedings. *Id.* at 243.

165. *Id.* at 131-38.

and that no one knew she was coming.¹⁶⁶ In rebuttal, the City Bar called Assistant District Attorney Mork, who had assisted Martin in the trial, and Judge Gibbs, the trial judge, both of whom testified that they did not learn that Annette would testify until the following day.¹⁶⁷ The only possible reason for calling the rebuttal witnesses was to preserve the argument that Palmieri knew in advance that Annette intended to lie about when she had arrived in New York City.

Palmieri conceded that he had gotten carried away in his long summation, but viewed this as a minor dereliction.¹⁶⁸ As to his failure to correct Annette's perjury, he maintained that his duty to his client, Delane, precluded him from doing so. Even if he was wrong about that, he argued, it was only a question of "very nice professional ethics about which opinions might differ, but a question which certainly does not involve anything that might subject [him] to professional condemnation."¹⁶⁹ Judge Freedman disagreed. He issued a lengthy report adopting the City Bar's version of the facts and concluding that Palmieri had engaged in gross professional misconduct.¹⁷⁰ The matter was then referred to the intermediate appellate court.

The City Bar's argument in court was essentially the same one that the referee had previously adopted. In response, Palmieri, still represented by Taylor, again denied that his motive and intent were to assist Annette in her perjury, and he denied that his failure to correct her false testimony was misconduct. Palmieri argued that he "went to the utmost extent that he ought to have gone, and that was consistent with

166. Appellant's Brief, *supra* note 64, at 17.

[A]t least as early as the noon recess on the 9th [Palmieri] informed the court officials that he intended to call Annette. That fact conclusively disproves the improper motive which is sought to be attributed to him in asking Annette, after her first unexpected answer, what she had in her hand. That question could not possibly [sic] have been asked for the purpose of making it appear that she had come straight from the train, and without his knowledge, when he himself had given notice some time in advance of her appearance that he expected her.

Id.

167. Transcript of Record, *supra* note 3, at 211 (testimony of Assistant District Attorney Mork stating that he did not learn until after the lunch break on the 10th that Annette would testify, only shortly before she was called to the stand); *id.* at 229-31 (testimony of Judge Gibbs stating that he was not told until after lunch on the last day of the trial).

168. *Id.* at 179-80 (Palmieri testified, "it was not a very happy expression for me to have chosen, and I should have chosen a more appropriate expression [than Divine Providence], but it was in the heat of a trial."); Brief for Respondent, *supra* note 68, at 26, 45-46.

169. Brief for Petitioner at 20, *In re Palmieri*, 117 N.E. 1078 (N.Y. 1917) (quoting Palmieri's counsel's argument to the Referee).

170. Transcript of Record, *supra* note 3, at 22-30.

his duties to his client, in asserting on the summing up that he would not believe the Annette woman on oath.¹⁷¹ He stressed that he had not asked the jury to credit Annette¹⁷² but to find none of the prostitutes credible, and that his reference to Annette's false testimony about reading of the trial in the *Evening Journal*, although unfortunate, was just "a passing phrase in the heat of summing up" while his mind and the thrust of his argument were on other things.¹⁷³ Palmieri's brief also called attention to the prosecutor's "unfair and un-lawyerlike" conduct of the trial, including his failure to warn Palmieri about Annette's grand jury testimony.¹⁷⁴

Palmieri's brief distinguished the disciplinary cases cited by the grievance committee and the referee, which had involved lawyers' deliberate misconduct in the representation of personal-injury plaintiffs for a contingent fee. He argued that in any event, criminal and civil representations are not analogous. The personal injury lawyer who keeps silent in the face of perjury has a financial motive to do so. Plus, Palmieri argued, the personal injury lawyer has "an easy way to extricate himself from an embarrassing situation" by moving for a mistrial, to which the judge in the middle of criminal trial would not agree.¹⁷⁵ In a criminal trial, Palmieri argued, any lawyer might have taken the view "that it was not for him to assert affirmatively the facts about the woman's coming to Court, lest that have an influence upon the decision of the Jury which might have been disastrous for the defendant, and yet the defendant be an innocent man."¹⁷⁶

Further, Palmieri pointed out that understandings about ethics were changing and that, at the time of the *Delane* trial, whether a criminal defense lawyer must correct a witness's false testimony on an issue not central to the case was "a decidedly debatable question, and one upon

171. Brief for Respondent, *supra* note 68, at 49.

172. *Id.* at 24-25. This was largely, but not entirely, true. Palmieri's summation did refer to Annette's testimony that she never gave Delane money, although he did not dwell on this. Transcript of Record, *supra* note 3, at 589. As Palmieri's brief explained: "All through respondent's summing up he was endeavoring in a most lawyerlike way to accredit the woman's story, on the main issue, and still without accrediting the woman." Brief for Respondent, *supra* note 68, at 23.

173. Brief for Respondent, *supra* note 68, at 26 ("It was a passing phrase in the heat of summing up. His mind, at the moment he spoke, was centered upon the thought that a woman of the physique and manner of the witness Annette was not the kind of a woman who would be the victim of a white slaver, and his mind was centered upon the thought that he was thankful that she was there in Court so that the jury could have a look at her.") (citation omitted).

174. *Id.* at 27-28.

175. *Id.* at 49.

176. *Id.* at 50-51.

which many lawyers would readily differ.”¹⁷⁷ He noted that many lawyers, though not all, still adhered to Lord Brougham’s famous dictum that the lawyer’s sacred duty to protect his client “by all means and expedients” regardless of the costs to others or himself “is the highest and most unquestioned of his duties.”¹⁷⁸ It was not fair to resolve debatable questions by punishing a lawyer for conduct occurring before the Court authoritatively resolved these questions and gave notice to the bar. He concluded:

[I]n considering the questions that we are here debating, one characteristic must be borne in mind that is bred in the bone and sinew of the lawyer at the American Bar, and that is that in the criminal trials throughout this country the play goes back and forth, with a desire on the part of the District Attorney to convict, and on the part of the defendant’s counsel to acquit, that passes, in its intensity, any professional efforts put forward in criminal trials in England, or anywhere else that we know of. . . . [U]nder the cloak of worthy ends, prosecuting officers are too prone (as instanced here) to employ those same strenuous means for the purpose of securing a conviction, that are known to advocates at the criminal Bar for the purpose of securing an acquittal. The methods of either—and that of the prosecuting officer as much as counsel for the defense—may call for present criticism. This Court may now desire to rebuke a tendency, or to check a practice with reference to criminal trials. But, even at that, such is a very different thing from censuring a particular advocate for adhering to habits and customs of the bar in that class of trials as they commonly exist to-day.¹⁷⁹

The intermediate appellate court judges issued three opinions.¹⁸⁰ Writing for all but one of the five judges, Presiding Justice Clarke adopted the referee’s report (which in turn had adopted the City Bar’s brief) virtually wholesale. His opinion pointedly rejected any claim “that counsel’s obligation to the court of which he is an officer is any less stringent in a criminal than in a civil case.”¹⁸¹ Justice Clarke found that Palmieri failed to conform to the professional standards by not correcting Annette, his own important witness, when she gave testimony that he knew to be deliberately and knowingly false.¹⁸² The Justice also

177. *Id.* at 51.

178. *Id.*

179. *Id.* at 53-54.

180. *In re Palmieri*, 162 N.Y.S. 799 (App. Div. 1916), *rev’d*, 117 N.E. 1078 (N.Y. 1917).

181. *Id.* at 803.

182. *Id.* at 803-04.

expressed skepticism about Palmieri's claim that he did not deliberately elicit Annette's lies. He adopted the City Bar's argument that Palmieri should have said to Annette "on her first statement that she had just reached town that morning: 'Why, are you not mistaken? Did you not come to see me yesterday?'"¹⁸³ The Justice observed that Palmieri's failure to do so "is susceptible to the inference that he knew exactly what she was going to testify to."¹⁸⁴ (This, despite the fact that Annette's first statement that she had just reached town was interrupted by an objection that the trial judge sustained.) Justice Clarke's opinion also concluded that there "certainly is no excuse for [Palmieri's] adopting such false testimony in his own summing up."¹⁸⁵

Justice Scott issued a concurring opinion joined by the other three Justices in the majority.¹⁸⁶ He rejected Palmieri's ethical premises more vehemently and condemned his conduct more harshly. First, he dispatched with Palmieri's argument that criminal and civil litigators are differently situated, and that the understanding expressed by Lord Brougham, which many lawyers accepted, helps explain the difference. Justice Scott wrote:

[T]he often-quoted dictum of Lord Brougham as to the duty which a lawyer owes to his client, and which is cited to us by this respondent's counsel, has been frequently misconstrued and misapplied as if it were an authority for wrongdoing, which it distinctly is not.

There is no recognized rule of law or ethics which justifies the conduct of counsel in any case, civil or criminal, in endeavoring by dishonest means to mislead the court or jury even if to do so might work to the advantage of his client. The interest of the public and the honor of the profession alike require that counsel in a criminal case, as well as a civil, shall employ honest methods and refrain from deceit and chicanery. In this sense I deny most emphatically that the obligations of an attorney to the court are any different in a civil and in a criminal case. . . .

183. *Id.* at 804.

184. *Id.*

185. *Id.* (The Justice concluded, "[f]or the expression of his thankfulness to God for the intervention of Divine Providence in producing this witness, when he himself was the instigating cause by the direct instrumentality of his client, he must be held personally responsible, as attempting thereby to deceive the court and jury by thus solemnly ratifying her false testimony.")

186. *Id.* at 804, 808 (Scott, J., concurring).

It will be difficult to find in [the Canons of Ethics] a justification for using in behalf of an accused person unfair and dishonorable means, such as I am convinced were used by the respondent.¹⁸⁷

Justice Scott then maintained that Palmieri's conduct was worse than the City Bar alleged. Based on the documentary record, Justice Scott was convinced that Palmieri knew from the beginning that Annette intended to lie and he deliberately helped her along. The only open question in Justice Scott's mind was whether Palmieri had "concocted this scheme" in the first place.¹⁸⁸ No doubt someone had, he wrote,

[B]ecause it is beyond belief that the woman though[t] it out for herself unaided and uncoached. She was a common prostitute and, as her examination indicated, had no more education or intelligence than is commonly found among such persons. It is inconceivable that she should have either appreciated the necessity of accounting for her presence in the way she undertook to do, or developed the elaborate story to so account for it. That some one invented the story and coached her in it I consider to be certain. I do not say that it was the respondent, although he had ample opportunity to do so in the course of her two visits to his residence; but, if the only charge against him was that he instructed the Annette woman to swear falsely, it may be that no more than a Scotch verdict [i.e., a verdict of "not proven"] could be reached on the evidence.¹⁸⁹

After describing the evidence at length, Justice Scott concluded:

In my opinion, [Palmieri's] obvious helping [Annette] to lie on the stand, and his deliberate and emphatic adoption in his summing up to the jury of what he personally knew to be false testimony, was the equivalent of false swearing by himself, and was precisely as reprehensible and worthy of discipline as it would have been if he had himself taken the stand and testified falsely.¹⁹⁰

Finally, in a lone dissent, Justice Page took a very different view of the relevant ethics principles as well as the facts.¹⁹¹ Surveying the Canons of Ethics that provided distinctive obligations for criminal and civil litigators, he maintained:

187. *Id.* at 804-05.

188. *Id.* at 805.

189. *Id.* at 805-06.

190. *Id.* at 807.

191. *Id.* at 808 (Page, J., dissenting).

The obligation of an attorney to court and client are very different in a civil and a criminal case. In a civil case an attorney is under no obligation to accept a retainer; in a criminal case, he may be assigned to defend a person whom he believes to be guilty, and it is then his duty to defend. In a civil case, if it develops in the trial of the cause that his client has not a meritorious cause of action or defense, and that he has been deceived by his client, and the suit is not being prosecuted or defended in good faith, he is under an obligation to so inform the court and withdraw from the cause. In a criminal prosecution, the attorney having accepted a retainer, believing in his client's innocence, he cannot withdraw even if his client confesses his guilt and demands that the attorney continue in his defense. And, if the attorney should inform the court of the confession, it would be a grave breach of his duty.¹⁹²

Justice Page observed that, given the different ethical responsibilities of a criminal defense lawyer, professional standards announced in prior disciplinary cases arising out of civil litigation could not "even remotely . . . be considered as a precedent for" the majority's conclusion that Palmieri had a duty to correct Annette's false testimony.¹⁹³

If Palmieri had deliberately elicited Annette's false testimony, Justice Page agreed, he would deserve serious condemnation, but Justice Page found no reason to conclude that Palmieri asked questions for that purpose, and noted that Palmieri was not formally accused by the City Bar of having done so.¹⁹⁴ He disputed his brethren's conclusion that in response to Annette's volunteered and unresponsive falsehoods on direct examination, and even though the prosecutor then led her "into contradictions and improbable statements which demonstrated the falsity of her evidence,"¹⁹⁵ Palmieri was professionally obligated to do more:

He left the matter, as it was, with the witness' testimony discredited, for the triers of the fact to determine. Under the circumstances, was he required to do more? The learned referee and the majority of the court say, "Yes, he should have further discredited the witness by showing on this collateral and immaterial matter that the witness had deliberately and knowingly testified falsely." Had he done so, there can be no doubt that it would have tended strongly to have destroyed, in the minds of the jury, credence in her testimony on the facts in issue.

192. *Id.*

193. *Id.*

194. *Id.* at 811, 813.

195. *Id.* at 810.

Yet, being false testimony as to an immaterial fact, under the rules of law they would not have been allowed to reject her testimony as a whole. He had not brought that fact into the case. He had presented a witness produced by his client to substantiate his defense. He had presented the evidence to the court. Without his solicitation the witness had volunteered false testimony of an immaterial fact. Bearing in mind that it was his duty to lay before the court the evidence his client claimed proved him not guilty, irrespective of his own belief, can it be held that he holds himself personally liable for the truth of the testimony of the witness, even as to collateral matters, and that he must show the falsity of such statements, or render himself liable to be disbarred? If such a rule is to be enforced, few lawyers will dare to defend one charged with crime. The question would constantly be presented to their minds: Shall I betray my client, or shall I take the risk of disbarment?¹⁹⁶

As to Palmieri's summation, Justice Page agreed that the "one phrase" in which Palmieri thanked Divine Providence, "under the circumstances of the case, was inexcusable" but not a deliberate adoption of Annette's false testimony, and not worthy of anything more than a harsh reprimand.¹⁹⁷ The other four Justices saw it differently, concluding that Palmieri had engaged in gross misconduct deserving serious punishment. To this, viewing Palmieri's only wrong to have occurred in the summation, Justice Page observed:

To my mind, my Brethren have adopted a stricter rule than has ever been recognized by the courts or the profession at large. . . . However writers on moral philosophy and ethics may have differed [over] time, the legal profession have recognized the duty of the lawyer in a criminal case to defend a client whom he knew to be guilty and to give him the benefit of all his skill and ability in presenting the defense by way of evidence and argumentation. Never, until this case, has the tremendous responsibility for his utterance during a summation been suggested or imposed.¹⁹⁸

On December 30, 1916, reporting on the decision issued the day before, the newspaper announced that "one of the best known attorneys in the city" had been disbarred.¹⁹⁹ But Palmieri was undaunted. He issued a statement expressing confidence that he would be exonerated:

196. *Id.* at 810-11.

197. *Id.* at 811-12.

198. *Id.* at 812-13.

199. *Ex-Justice Palmieri Disbarred by Court*, N.Y. TIMES, Dec. 30, 1916, at 16.

My side of the case has impressed at least one of the Judges of the Appellate Division and I would therefore refer you to the opinion of Mr. Justice Page. In addition I would mention the fact not referred to in any of the opinions, that almost every Judge on the bench in New York, Brooklyn, Queens, and Richmond, as well as every District Attorney of every county in the greater city, excepting, of course, the District Attorney of the Bronx, who made the charge and who has been hounding me for the last two years, has attested under oath to my high standing and reputation at the bar.

I shall live to see the day when I shall be fully vindicated in the eyes of the New York public.²⁰⁰

Palmieri challenged his disbarment in the state's highest court, the Court of Appeals. His case was argued by a former judge, Nathan L. Miller.²⁰¹ The Bar Association's case was argued by Thomas D. Thacher, who had recently become a partner of his father's firm and would later go on to serve as a federal judge and United States Solicitor General as well as president of the City Bar.²⁰²

Palmieri took a different tack in the Court of Appeals, because the lower court's decisions had shifted the focus. Four of the five Appellate Division panelists—Justice Scott and the three concurring in his opinion—had gone beyond the City Bar's theory, determining that Palmieri had deliberately elicited Annette's perjury. This, Palmieri argued, had never been charged and was not supported by the evidence.²⁰³ Thacher argued that the lower court had an alternative ground for disbaring Palmieri, namely, his failure to correct Annette's perjury and his fleeting reference to her false testimony; that this wrongdoing was amply established by the evidence; and that the Court of Appeals owed deference to the Appellate Division's sanction for this wrongdoing.²⁰⁴ But Palmieri argued quite plausibly that the Appellate Division would never have imposed such a harsh sanction as disbarment if it thought that all he had done wrong was fail to correct testimony that was mainly elicited and thoroughly impeached by the prosecutor, and step slightly over the line in summation.²⁰⁵

200. *Id.*

201. *In re Palmieri*, 117 N.E. 1078, 1078 (N.Y. 1917); *Not a Candidate Miller Insists*, N.Y. TIMES, July 16, 1920, at 4.

202. *In re Palmieri*, 117 N.E. at 1078; Dep't of Justice, Thomas D. Thacher, <http://www.usdoj.gov/osg/aboutosg/thacher.htm> (last visited Feb. 26, 2008).

203. Appellant's Brief, *supra* note 64, at 5.

204. See Respondent's Points, *supra* note 161, at 19-20, 27.

205. Appellant's Brief, *supra* note 64, at 43-45.

On July 11, 1917, the court issued its decision, by a vote of three to two, but without an opinion. With Judge Cardozo as one of the dissenters, the court wrote simply and anticlimactically, “[o]rder reversed, and proceedings dismissed, on the ground that the evidence does not warrant the conclusion that there was intentional misconduct on the part of the appellant, justifying his disbarment upon the charge sustained by the Appellate Division.”²⁰⁶ Whether the court meant that there was no intentional misconduct at all or simply that Palmieri’s intentional misconduct did not warrant his disbarment, is unclear. The court said nothing to resolve the disagreement about when a lawyer had a duty to correct a witness’s false testimony, how it should be corrected, and whether a criminal defense lawyer’s duty in this or other regards differed from that of a civil litigator. It said nothing about how disciplinary authorities and courts should evaluate circumstantial evidence addressing a lawyer’s intent and motives and where the burden should fall on the question of whether the lawyer’s purposes were improper. We will probably never know why Judge Cardozo disagreed with the majority, and whether his disagreement was influenced by his own family history—by the fact that his father, a state trial judge, had earlier been implicated in a corruption scandal that led to his resignation (and to the creation of the City Bar).²⁰⁷

Palmieri resumed his practice. The press continued to refer to him as “Judge,” as it would do in 1927 when it reported that a bomb had exploded at his home in Brooklyn and a threatening note left behind—which remained an unsolved crime.²⁰⁸ Over the years, Palmieri watched his four children grow up and his two sons become lawyers.²⁰⁹ When he died in November 1937, his funeral was attended by Mayor Fiorello LaGuardia, for whom his son Edmund then served as law secretary.²¹⁰

206. *In re Palmieri*, 117 N.E. at 1078.

207. See, e.g., ANDREW L. KAUFMAN, *CARDOZO* 16 (1998); Andrew L. Kaufman, *The First Judge Cardozo: Albert, Father of Benjamin*, 11 J. L. & RELIGION 271, 308-10 (1994).

208. *Ex-Justice Palmieri’s Home is Bombed; He Blames Blackmailers Who Asked \$50,000*, N.Y. TIMES, Feb. 25, 1927, at 1; *New Threat Spurs Hunt for Bombers of Palmieri Home*, N.Y. TIMES, Feb. 26, 1927, at 1; *Palmieri Buys Gun and Leaves the City*, N.Y. TIMES, Feb. 27, 1927, at 4; *Palmieri Bomb Still a Mystery*, N.Y. TIMES, Feb. 28, 1927, at 7. At around the same time, Palmieri’s name was in the news because a swindler posing as both Palmieri’s son and an Assistant District Attorney obtained thousands of dollars from criminal defendants and their relatives by promising to use his connections to free the defendants from prison. *Robs Convict’s Mother*, N.Y. TIMES, Feb. 26, 1927, at 3; *Arrest ‘Nick the Barber’*, N.Y. TIMES, May 18, 1927, at 25; *‘Nick the Barber’ Beaten by Woman*, N.Y. TIMES, May 19, 1927, at 3.

209. *Ex-Justice Palmieri’s Home is Bombed*, *supra* note 208.

210. *Palmieri Service Held*, N.Y. TIMES, Nov. 10, 1937, at 25.

At a ceremony in December 1940, after LaGuardia appointed Edmund to serve as City Magistrate, John Palmieri's gavel was passed down to his son,²¹¹ who later served at length and with distinction as a federal district judge.²¹²

VI. CONCLUSION: SOME LESSONS

Does Palmieri's story have implications for how criminal defense lawyers practice today? One way to approach this question is to consider some of the problematic features of lawyer regulation illustrated by Palmieri's story and to consider whether the problems still remain in one form or another.

First, in Palmieri's day, it was unclear where the courts drew the disciplinary lines, particularly for criminal defense lawyers. The question on which the City Bar focused explicitly in his case was illustrative: Did a criminal defense lawyer have to correct a witness's false testimony when he did not intentionally elicit it and, if so, in what manner? There were relatively few opinions sanctioning litigators, none addressing these precise questions, and none focusing on criminal defense lawyers in particular. The Canons of Ethics were vague and incomplete. The lines were moving in response to the organized bar's efforts to codify and enforce a stricter set of professional norms. The courts were essentially making it up as they went along.²¹³ Is it different now? Are the lines of the law governing lawyers stable and precise?

Criminal defense lawyers, and others, still encounter many uncertainties, as changes take place in the rules, criminal laws, nature of law practice, and society.²¹⁴ Consider the question of professional conduct disputed in Palmieri's case. Not until the 2002 revisions to the *ABA Model Rules of Professional Conduct* did the rules state explicitly that if a lawyer calls a witness who offers material evidence that the

211. *Palmieri Gets Father's Gavel*, N.Y. TIMES, Dec. 3, 1940, at L21.

212. Justice Ruth Bader Ginsburg was one of Edmund Palmieri's law clerks. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Feb. 26, 2008).

213. See generally Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 39-41 (2005) (discussing that the judicial practice of developing standards on an ad hoc basis through judicial opinions has continued even after the courts' adoption of formal rules).

214. See, e.g., *Attorney Grievance Comm'n of Maryland v. Rohrback*, 591 A.2d 488, 498-99 (Md. 1991) ("We are conscious of the difficulty which practitioners, courts, and commentators long have had in trying to define clearly the lines beyond which conduct becomes a disciplinary violation in the area of client confidences.").

lawyer knows to be false, the lawyer must “take reasonable remedial measures,” even if the lawyer did not personally offer the evidence.²¹⁵ At least until then, one might have argued that Palmieri would have had no duty under the Model Rules to correct Annette’s false testimony. He did not “offer” the evidence on direct examination; Annette volunteered it unresponsively and much of it was stricken upon the prosecutor’s objection. He certainly did not “offer” it on cross-examination; the prosecutor elicited it, believing it to be false, in order to impeach Annette. Even now, it would not be clear what “reasonable remedial measures” a lawyer in Palmieri’s position might have to take. Would it not be enough for the lawyer to wait until closing argument, as Palmieri did, and then acknowledge that the witness should not be believed?²¹⁶ Many other uncertainties remain about the law and ethics of criminal defense practice. Indeed, the basic question of whether to treat all lawyers the same or to give criminal defense lawyers greater leeway remains contested.

Second, in Palmieri’s case, at least from the criminal prosecutor’s perspective, the propriety of the lawyer’s conduct depended on the resolution of witness credibility. Who was telling the truth—Annette or Palmieri? Witnesses were susceptible to pressure to say what they perceived the prosecutors wanted to hear. The lawyers’ clients often had an incentive to turn against their lawyers to better their own lot. The truth might be essentially unknowable. Little has changed in that regard.

Third, particularly from the disciplinary perspective, the propriety of Palmieri’s conduct turned largely on his intent, which could only be gleaned by drawing inferences from circumstantial evidence and subjectively assessing his and others’ credibility. As the Court of Appeals’ determination made clear, a central question was whether there was *intentional* misconduct (for example, an intent by Palmieri to elicit or exploit false testimony, both of which he denied). Even where this is not the determinative question as to the propriety of the lawyer’s conduct, it is almost invariably central to the question of whether and

215. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3), R. 3.3 cmt. 10 (2007). Thus, while a lawyer may not intentionally elicit *any* “evidence that the lawyer knows to be false,” a lawyer’s responsibility to remedy a witness’s false testimony applies only if the false testimony was “material.” *Id.* at R. 3.3(a)(3).

216. The premise of “remedial measures” is to “undo the effect of the false evidence,” so that the court is not deceived and the truth-seeking process is not subverted. *Id.* at R. 3.3(a)(3), R. 3.3 cmt. 10. It might therefore be argued that, even under today’s standards, Palmieri had no duty personally to correct the witness’s testimony, given the ease with which the prosecutor demonstrated its falsity.

how to punish it. Think how differently Justice Scott and Justice Page read the same record. Again, little has changed. The truth is often unknowable and the truth-seeking process is fallible.

Fourth, in interpreting the evidence, drawing inferences, and making credibility findings, prosecutors, disciplinary authorities, and courts in Palmieri's day brought to the task a set of assumptions that were socially and culturally contingent and contestable. Doubtless, District Attorney Martin, looking across the aisle at Palmieri as a defense lawyer, was influenced by a set of negative assumptions about how his adversaries generally played the game. And adversaries they surely were, as the exchanges between prosecutors and defense lawyers made plain. Palmieri's counsel was almost facetious when complaining about the prosecutor's breach of etiquette in dealing with "a brother attorney."²¹⁷ The regard between defense lawyers and prosecutors was more honestly captured by Steuer's observation that District Attorney Martin "cares not whom he ruins."²¹⁸

Similarly, the grievance officials of the City Bar were likely influenced by assumptions about ethnic lawyers. As Jerold Auerbach has discussed,²¹⁹ this was a time when law licenses were sought by members of the immigrant classes who were settling in United States cities, such as the Irish, Italian, and eastern European Jewish immigrants who came through Ellis Island and, in many cases, stayed in New York City. Lawyers who came from the established classes saw the new Americans' entry into the profession as a threat to high standards of professional practice.²²⁰ In homogenous rural communities, professional expectations could be communicated and maintained informally, but not in the cities, where recent arrivals and their offspring were thought to be turning the profession of law into a business, and not an altogether savory one. While the Italian community in New York City celebrated Palmieri, the corporate lawyers of the City Bar probably looked down their noses at him, viewing him as a member of a lower class of lawyers of dubious ethics.²²¹

217. Brief for Respondent, *supra* note 68, at 28.

218. *Raps District Attorney*, *supra* note 146.

219. See generally JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1977) (examining the effects of social change in the twentieth century on the legal profession and the response of elite lawyers).

220. *Id.* at 40-73.

221. So, too, gender assumptions entered the picture. Recall Justice Scott's declaration that it was inconceivable that Annette, "a common prostitute," appreciated the need to lie about how and

The assumptions of Palmieri's day are increasingly uncommon, if not entirely eliminated from Wall Street law practice. But those overseeing lawyer discipline may well be prisoners of other sets of assumptions that, from a distance of years, will one day seem equally dubious.

Fifth, in both the adjudicative process and the lawyer regulatory process of Palmieri's day, criminal defense lawyers were not playing with prosecutors on a level field. A lawyer such as Palmieri was at risk of prosecution by his opposing counsel if he was identified too closely with his client's or a witness's criminal conduct. The prosecutor could not be expected to evaluate the evidence at all objectively, given the enmity between them. Prosecutors, on the other hand, were likely to view their own conduct more charitably. At the hearing on the Duers's whereabouts, the judge observed that District Attorney Martin was not above the law and was himself a potential subject of grand jury proceedings.²²² But that was not a realistic risk. Who would indict him? He might pursue a defense lawyer for hiding a prosecution witness. But he had no qualms about himself hiding, or even abducting, potential witnesses.

The same imbalance continues to this day.²²³ Prosecutors might not hesitate to indict criminal defense lawyers for hiding or destroying evidence, even in contexts where both the lawyers' intent and the relevant legal and ethical standards are unclear and highly debatable.²²⁴ But prosecutors never indict individual prosecutors for willfully withholding or concealing discovery material from the defense, except perhaps in the exceedingly rare case where the prosecutor in question is a whistle-blower or otherwise has become an enemy of the people.²²⁵

when she came to New York City for the trial and dreamed up the lies herself. *In re Palmieri*, 162 N.Y.S. 799, 805 (App. Div. 1916) (Scott, J., concurring), *rev'd*, 117 N.E. 1078 (N.Y. 1917).

222. *Writ Fails to Find Martin Witnesses*, *supra* note 123.

223. See generally Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 329-30 (1998) (discussing the interplay between criminal law and the professional norms governing lawyer behavior).

224. See, e.g., Alison Leigh Cowan, *Lawyer Admits Destroying Evidence of Pornography*, *N.Y. TIMES*, Sept. 28, 2007, at B5 (A lawyer pled guilty to a lesser charge of misprision—"assisting the commission of a felony by failing to report it or by concealing it"—after being indicted for obstruction of justice for destroying a laptop containing child pornography even though the destruction occurred before a criminal investigation was foreseeable.).

225. See, e.g., Philip Shenon, *Ex-Prosecutor Acquitted of Misconduct in 9/11 Case*, *N.Y. TIMES*, Nov. 1, 2007, at A18 (discussing former federal prosecutor who was tried but acquitted of withholding discovery material in a terrorism prosecution).

Has anything changed since Palmieri's day? Certainly, the ethical quality of both prosecution and criminal defense practice has been elevated. There is no justification for an assumption that prosecutors, criminal defense lawyers, or any other lawyers as a class, are engaging in improper practices. Further, the enmity between prosecutors and criminal defense lawyers has abated, though hardly been eliminated, at least in New York City. But have increased respect and civility come at a cost?

If Palmieri can be taken as representative, criminal defense lawyers of his day were more willing to lawyer at the edge, at risk of going over the edge and incurring whatever consequences might follow. Palmieri evidently drank from Lord Brougham's well. He was willing to go toe-to-toe with the prosecutor, to serve his client not only regardless of the consequences to others, but regardless of his own self-interest. This meant incurring not only the risk that prosecutors, grievance committees, and courts would later look at what he believed to be proper conduct and see it differently when they examined circumstantial evidence and resolved credibility questions through the lens of their own assumptions; he also incurred the risk that, in his zeal to serve his client up to the edge of the law, he would put at least a toe over the edge, as he concededly did in his summation. Palmieri may have felt free to take these risks, in part, because the disciplinary process was just developing.

Things are different today. Criminal defense lawyers appear more likely to stay far clear of the edge. And who can blame them, given the risks created by today's far better developed set of regulatory processes?

Consider, for example, the lessons of Palmieri's experience, even for lawyers of his own day. Yes, the Court of Appeals vindicated him, as he predicted it would. But if he had it to do all over again, even if he were acting with the most innocent of intentions, would he engage in the same conduct, run the risk of a criminal prosecution and a disciplinary prosecution, and endure the possibility that next time, the decisive three-to-two decision would tip the other way. For what—a \$250 fee that had already been paid? Surely, the cost of his defense and the lost income, to say nothing of the anxiety, cost many times that much. Nothing in the Court of Appeals order reinstating him would have discouraged future criminal prosecutors and grievance committees from proceeding the same way in similar circumstances. And, of course, the next lawyer in Palmieri's position might not have the resources to defend himself by hiring a succession of top lawyers and producing testimonials from fifty judges and public officials.

Consequently, in the lawyer regulatory process, it is important to think about the inter-relationship between the substantive standards governing lawyers (established by disciplinary rules and judicial decisions, including interpretive opinions), the legal culture, the exercise of enforcement authority, and the courts' exercise of its sanctioning power. These all interact with each other, for better or worse.

For example, the disciplinary rules themselves can be drafted in ways that give more or less clarity to lawyers about how to act in a given situation. Rules that are ambiguous or vague give less clarity. For example, assuming Palmieri should have known that there was a duty to correct Annette's false testimony, in what manner was he required to correct it? The intermediate appellate court suggested he was required to disclose through a question to her that she had met with him the previous morning, in order to correct her false testimony that she had arrived that morning by train. Was he also supposed to ask questions indicating that Delane knew where she was and had summoned her to New York City? If she denied these, was he required to stipulate to the contrary, disclosing facts that would ordinarily be confidential?

Less clarity is also provided by rules whose application turns not on facts that are objectively easy to ascertain, so that it is clear to all when the rule is triggered, but on "facts" that reflect subjective judgments and that may look very different to a regulator *ex post* than to a lawyer *ex ante*. As Justice Stevens observed in *Nix v. Whiteside*,²²⁶ the "knowledge" requirement, as in the rule forbidding a lawyer from knowingly introducing false testimony, falls in this category.²²⁷

Particularly when lawyers lack certainty about how to proceed in a given case, a rule can give lawyers leeway or place them on a razor's edge. As Fred Zacharias and I have discussed, one function of "permissive" rules of professional conduct—that is, rules that say a lawyer "may" engage in conduct but that implicitly authorize lawyers not to engage in the particular conduct—is to give lawyers wiggle room, a space where they will not be disciplined no matter how they act as long

226. 475 U.S. 157, 190 (1986) (Stevens, J., concurring).

Justice Holmes taught us that a word is but the skin of a living thought. A 'fact' may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.

Id.

227. *Id.*

as they act in good faith.²²⁸ For example, how should a lawyer act when he “knows” the client intends to engage in certain criminal conduct, such as a crime of violence? Most rules say the lawyer *may* disclose the client’s confidence where reasonably necessary to prevent the crime.²²⁹ In contrast, a rule that said the lawyer *must* report the client’s intent where reasonably necessary to prevent the crime, if strictly enforced, would put the lawyer in an almost impossible situation: If a regulator decided that in hindsight, disclosure was not reasonably necessary, the disclosing lawyer could be disciplined for breaching the confidence; if the regulator decided the opposite, then the nondisclosing lawyer could be disciplined for failing to report.²³⁰

In the case of the standard advocated by the City Bar—namely, that a lawyer must correct testimony that he “knows” is false—a lawyer is similarly on a razor’s edge. It is clear in hindsight that Palmieri knew Annette was lying, since he met with her at a time when she claimed to be upstate. But if “knowledge” means something other than firsthand knowledge, then a lawyer will sometimes be unsure what he does and does not “know.” If the lawyer corrects the witness when he strongly *suspects* but does not *know* her testimony is false, he is undermining the client’s case and, thus, acting unethically; if he *does* know her testimony is false, given how the information he possesses is later viewed by others, but remains silent, thinking that he had merely a strong suspicion but not knowledge, he has violated a different standard. There is no room for error. Palmieri was on a razor’s edge in a different respect, because of uncertainty about how to correct the witness’s false testimony. If he went too far, he would be violating his confidentiality duty and violating his duty of zealous advocacy; if he did not provide sufficient correction, he would be violating his duty of candor to the court.

With respect to unclear standards of conduct, courts can create greater clarity. They can do so in opinions interpreting disciplinary rules in the context of litigation²³¹ or in advisory opinions.²³² They can also be

228. Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 300 (2006).

229. *E.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2007).

230. *See, e.g.*, Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client’s Threat to Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479, 495 & n.102 (2000).

231. *See, e.g.*, Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 497-99 (1996) (discussing adjudication, rather than rule-making, as a means of clarifying disciplinary

more precise when they issue opinions establishing standards of conduct for lawyers through their exercise of their general supervisory authority.²³³ In general, however, courts have preferred the flexibility that comes with preserving a certain level of vagueness and ambiguity in the disciplinary rules and sanction opinions—hence rules such as those forbidding “conduct that is prejudicial to the administration of justice.”²³⁴ Such provisions enable judges to sweep in conduct that was not anticipated when the rules were drafted but that later seems deserving of condemnation, especially when it is fair to say that a lawyer should have known better even without explicit notice. Vagueness also preserves the appearance that the disciplinary rules are rules of “ethics,” codifying general standards that reflect commonly understood professional understandings about right and wrong, rather than somewhat arbitrary regulatory standards like the tax code. Vague rules also limit the amount of judgments that judges must make on the front-end (that is, in rule-making as opposed to adjudication), allow decisions to be made in concrete cases after an adversarial presentation, and enable judges to issue factually nuanced opinions that might be hard to codify. But, of course, uncertainty comes at a price, as the relevant expectations may not be as clear for lawyers as courts later suppose they were, and lawyers may refrain from acceptable and useful conduct to avoid crossing unclear boundaries.

The relationship between the substantive standard of conduct and fact-finding becomes important when the relevant “fact,” such as whether a lawyer “knew” that a witness’s testimony was false, is not readily ascertainable, because the “fact” is not objectively determinable. Procedural devices such as the burden of proof become significant to how lawyers will behave *ex ante* in light of the uncertainty. If the fact, such as the lawyer’s knowledge, must be proven by clear and convincing evidence, the lawyer will be less timid than if it may be established only by a preponderance of the evidence.

rules); see also Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 710-16 (1991) (discussing need to clarify disciplinary rules where the bounds are set by criminal law).

232. See Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 742 (2002) (discussing New Jersey Supreme Court’s selective review of ethics advisory opinions).

233. See generally Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003) (analyzing federal courts’ authority to regulate lawyers through the exercise of supervisory authority).

234. E.g., MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (2007).

When relevant rules and facts are unclear, the legal culture, enforcement policies, and sanctioning practices also become important. Understandings derived from the legal culture may fill in gaps in the rules and influence how lawyers act in areas of ambiguity.²³⁵ The cultural understandings about a criminal defense lawyer's role, for example, may encourage greater risk-taking in pursuit of the client's interests or greater caution. Courts have a role in influencing the legal culture—as, no doubt, the various Appellate Division opinions in Palmieri's case aimed to do. At the same time, courts may or may not accommodate the legal culture as it exists at any point in time.

The nature of enforcement policies and sanctioning practices becomes particularly important both when the meaning of the rules is unclear and when the relevant facts are unclear, especially when the legal culture of the time encourages risk-taking. Criminal prosecutors and grievance committees might refrain from bringing close cases, as a way of acknowledging the legitimacy of lawyering at the edge and the attendant risk of lawyering over the edge when the relevant substantive standards are unclear or do not provide discretion so that lawyers have room for error.²³⁶ In such cases, courts might issue opinions prospectively,²³⁷ appreciating the penalty that even a seemingly light sanction, such as a public reprimand, imposes on conscientious lawyers who are jealous of their professional reputation.

Is there a lesson here for regulatory authorities—prosecutors, disciplinary officials, and courts? Perhaps there is a lesson about the need to be sensitive to the tension between our profession's normative standards and traditions, which encourage criminal defense lawyers to be zealous advocates right up to the edge, and the regulatory processes, which push risk-averse lawyers in the opposite direction. Often, the regulatory authorities' rhetoric is not very sympathetic: If anyone should know what is expected of them, they say, it is lawyers; if anyone should

235. See generally Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19 (1997) (exploring the relationship between a lawyer's personal values and their professional conduct); Bruce A. Green, *The Religious Lawyering Critique*, 21 J. L. & RELIGION 283, 285-87 (2006) (recognizing that "religious values, commitments and identities" may be relevant to lawyers' professional conduct with respect to professional norms that are "incomplete and capacious").

236. See generally Green, *supra* note 223 (noting that prosecuting lawyers for violations of unclear standards of conduct may result in over-criminalization).

237. Palmieri suggested this, citing a nineteenth century federal decision in which United States Supreme Court Justice Miller declined to sanction a Colorado lawyer (and future United States Senator) for witness tampering when the conduct in question was not clearly improper under the understandings of the time. Brief for Respondent, *supra* note 68, at 51-53.

abide by the law, it is lawyers; the rules apply the same way to all lawyers. But this fails to take account of the blurriness of the legal and ethical lines and the fallibility of fact findings, both of which encourage risk-averse lawyers to temper their advocacy, avoiding conduct that they believe is lawful and that may well be, but that may be construed differently by prosecutors, disciplinary authorities, and courts. In some regulatory areas, we have no concern about telling people to stay well back from the edge and about punishing them when they stray over it. But legal representation, particularly on behalf of a criminal defendant, is an area where over-deterrence comes at a cost.

I have suggested in the past that lawyers, and particularly criminal defense lawyers, are different and should be treated differently in the criminal justice process.²³⁸ The same may be true, although perhaps less so, in the disciplinary process. Maybe criminal defense lawyers need to be cut some slack, in order to revivify an idea of “zealous[] [advocacy] within the bounds of the law”²³⁹ that places as much emphasis on zealous advocacy as on the legal bounds. That may be what the Court of Appeals thought it was doing in Palmieri’s case. Perhaps close to a century later it is time for courts to make the point more explicitly.

238. Green, *supra* note 223, at 385-92.

239. MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (2007).