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DAVID S. CAUDILL*

The Year of Truman Capote: Legal Ethics and *In Cold Blood*

> [As *Capote*] screenwriter Dan Futterman has admitted, reading In Cold Blood left him with a sense of an absence, an awareness "that Capote, who was the most interesting character in the book by far, wasn't there."[1]

As filmgoers in 2006 know, Truman Capote's *In Cold Blood: A True Account of a Multiple Murder and Its Consequences*[2] involves two stories. The first, including the subject matter of the book and two earlier films (the 1967 movie directed by Richard Brooks and the 1996 television miniseries directed by Jonathan Kaplan), not only details the brutal murder

* Professor and Arthur M. Goldberg Family Chair in Law, Villanova University School of Law. This article is based on the author's continuing legal education presentation at the 14th annual Law and Literature Alumni Weekend at Washington and Lee University School of Law, October 6–7, 2006.

1 Mark Kermode, Truman Capote, *You've Got a Lot to Answer for*, GUARDIAN UNLIMITED, Jan. 15, 2006, *available at* http://film.guardian.co.uk/features/featurepages/0,,1686611,00.html.

2 TRUMAN CAPOTE, IN COLD BLOOD: A TRUE ACCOUNT OF A MULTIPLE MURDER AND ITS CONSEQUENCES (Vintage International 1994) (1965).

of a Kansas farm family but comprehensively critiques a murder trial. Even as he claimed to refrain from judgment, Capote's indictments of the prosecutors, the defense attorneys, the judge, the jury, and an outdated doctrine of insanity strongly suggest a miscarriage of justice. This alone is reason enough to include *In Cold Blood* in the canon of conventional law and literature studies, insofar as the book provides vignettes of potentially unethical conduct, possible community bias infecting a trial, and seemingly bad law.[3]

The other story is about the author himself while he was writing *In Cold Blood* (including his personal life, his research practices, and his aesthetic goals) and is the subject of the recent films *Capote*[4] and *Infamous*.[5] Each film raises ethical questions of immediate interest to "new" journalists and "creative" reporters who share in Capote's heritage or write in the "true crime" genre.[6] Even if Capote's account of the Clutter murders would have been accurate, his techniques were disturbing:

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3 *In Cold Blood* can also be read as a critique of capital punishment. See LAW IN LITERATURE: AN ANNOTATED BIBLIOGRAPHY OF LAW RELATED WORKS 35–36 (Elizabeth Villiers Gemmette ed., 1998), which does not claim to represent the "canon" of law in literature, *id.* at 1, but which includes an annotation by Teree E. Foster on *In Cold Blood*:

> Truman Capote's dark non-fiction novel . . . chronicles [the Clutter murders] and its effects upon all persons touched by it.
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> . . . .
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> However, the essence of the novel is its depiction of capital punishment. . . .
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> . . . .
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> . . . [Capote] compels us to ask . . . whether execution of even sociopaths like Hickock and Smith is any less random and brutal than the crimes for which they were executed.

Id. at 35–36. Capote believed that capital crimes should be prosecuted by federal courts and that "those convicted should be imprisoned in a special Federal prison where, conceivably a life sentence could mean, as it does not in State courts, just that." GEORGE PLIMPTON, TRUMAN CAPOTE: IN WHICH VARIOUS FRIENDS, ENEMIES, ACQUINTANCES, AND DETRACTORS RECALL HIS TURBULENT CAREER 209 (1997).

4 CAPOTE (United Artists 2005) (directed by Bennett Miller and based on GERALD CLARKE, CAPOTE: A BIOGRAPHY (1988)).

5 INFAMOUS (Warner Independent Pictures 2006) (directed by Doug McGrath and based on PLIMPTON, TRUMAN CAPOTE, *supra* note 3).

6 *In Cold Blood* paved "the way for a string of artfully constructed works which attempted to capture the human components of those 'monsters' who habitually fascinate the public and media." Kermode, *supra* note 1. Kermode lists, as owing "a debt to In Cold Blood," JOE MCGINNIS, FATAL VISION (1983) (the story of convicted murderer Jeffrey MacDonald), EMLYN WILLIAMS, BEYOND BELIEF (1968) (regarding the Moors murders), GORDON BURN, SOMEBODY'S HUSBAND,

> Capote lied to his interview subjects, defiled the corpses of the murder victims, arranged for legal representation for two cold-blooded killers, and may have even fallen in love with one of them. For Capote, the end justified his unscrupulous means, and he surely sent a message to some aspiring journalists over the years.[7]

The more illusory ethical conflict in the films, however, concerns the writing of Capote's "true account." As biographer Kenneth Reed explains, creative reportage involves setting "down a continuum of factual information in such a way that it carries a fictive quality"; the author imposes artistic order, structure, and coherence on "a body of information."[8] However, just as Capote seemed to value the completion of his book more than the lives of its subjects,[9] he seems to have valued artistic structure over journalistic accuracy. As John Richardson (biographer of Picasso) charged: "Truman had absolutely no respect for the truth. He felt that as a fiction writer he had license to say whatever came into his head as long as it had a surprising point or shape to it, or an unexpected twist to its tail."[10] Capote had "wanted to write . . . a nonfiction novel—a book that would read exactly like a novel except that every word of it would be absolutely true."[11] Though he claimed to have succeeded, many of his interviewees said he did not.[12]

SOMEBODY'S SON (1985) (about the Yorkshire Ripper case), and BRIAN MASTERS, KILLING FOR COMPANY: THE CASE OF DENNIS NILSEN (1985) (based on the prison journals of serial murderer Nilson).

7 Peter Klein, *Film "Capote" Raises Disturbing Ethical Questions*, JOURNALISM ETHICS FOR THE GLOBAL CITIZEN, Jan. 2006, http://www.journalismethics.ca/book_reviews/. Klein mentions Judith Miller's inaccurate *New York Times* stories about Iraq's weapons capabilities, and discredited journalists Jayson Blair and Stephen Glass, as recent examples of journalistic ambition—the film *Capote* represents "the beginning of the end, the top of that slippery slope down which the profession of journalism has slid." *Id.*

8 KENNETH T. REED, TRUMAN CAPOTE 94 (1981).

9 The film *Capote* portrays the author as alternatively arranging for delay of the defendants' hanging in order to get his story, and later hoping that the execution happens quickly to provide a needed, spectacular ending to his book. CAPOTE (United Artists 2005).

10 *See* PLIMPTON, TRUMAN CAPOTE, *supra* note 3, at 308 (interview with John Richardson).

11 LAWRENCE GROBEL, CONVERSATIONS WITH CAPOTE 112 (1985).

12 *Compare* PLIMPTON, TRUMAN CAPOTE, *supra* note 3, at 207 (Capote claimed that "all of [*In Cold Blood*] is reconstructed from the evidence of witnesses"), *with id.* at 175 (according to KBI Agent Nye "it . . . was a fiction book"), *and id.* at 222 ("This business of a new art form—'nonfiction novel'—is a bunch of *garbage*," said Garden City Prosecutor Duane West.).

The risks of nonfiction storytelling—of imposing aesthetic structure on information—present challenges not only to New Journalists, but also to lawyers and judges. *In Cold Blood* therefore becomes relevant for another aspect of law and literature studies (in addition to its conventional law-*in*-literature aspect), namely law *as* literature. Every law student learns early in law school that facts, in lawyers' arguments and judicial opinions, can be selected and manipulated, and are as interpretable and unstable as legal doctrine. This phenomenon raises the question of the ethical limitations on legal storytelling.

The purpose of this study is to use Capote's *In Cold Blood* as a point of reflection on several ethical obligations of lawyers. In Part I, I focus on Capote's accounts of the prosecution's use of expert witnesses, and his suggestion that defense counsel were (i) unable or unwilling to deal with their personal conflicts of interest and (ii) incompetent, the latter of which became the subject of disciplinary investigations and federal court review. In terms of the duties of an advocate, Capote sees the prosecution as going too far, and the defense as failing to go far enough. In Part II, I turn to the ethical limitations on lawyers as storytellers, focusing on opening and closing arguments at trial. While it would seem to be unethical to fail to tell a client's story as dramatically as possible, there is always a risk of turning fact into fiction. I conclude in Part III that Capote's nonfiction novel, and the circumstances surrounding its writing, provide valuable ethical insights for students and practitioners concerning the goals and limits of trial advocacy.

I
IN COLD BLOOD AND ITS LAWYERS

Capote did not claim, as I do, that *In Cold Blood* is a critique of law.

> Capote himself did not apparently think of *In Cold Blood* as espousing a thesis or message. He told Perry Smith that [he had no] . . . "moral reasons worthy of calling them such—it was just that I had a strictly aesthetic theory about creating a book which would result in a work of art."[13]

[13] REED, *supra* note 8, at 115 (quoting Capote in an interview with L. Nichols, "Mr. Capote," NEW YORK TIMES BOOK REVIEW, Aug. 22, 1965, at 39).

Capote conceded that he felt "moved" by the circumstances in Kansas, but he also felt "detached" in his narration.[14] "[F]or the nonfiction-novel to be entirely successful," Capote explained, "the author should not appear in the work."[15] Capote biographer Kenneth Reed thought it "significant that Capote at no time renders a judgment about the criminals," so that a reader might make his or her own judgment without interference by the author.[16] One might ask, however, whether such detachment was achieved (or is even possible), given Capote's representation of the accused "Hickock and Smith as moral perversions of decent men brought about by the poverty, violence, and ill-luck that reached back for at least one generation."[17] Nevertheless, Capote claimed that one reason a nonfiction novel is harder to write than a conventional novel is that he "had to get away from [his] own particular vision of the world."[18]

Even if Capote managed in some degree to reserve judgment on the Clutter murder defendants, his disdain for the legal system is not hidden. Capote once remarked: "The only person at the moment on the [U.S.] Supreme Court whose grave I wouldn't spit on is Brennan. The rest of them, I would spit on their graves. Except the lady [O'Connor]. She hasn't been there long enough . . . ."[19] In his account of the Clutter murder trial, Capote was unimpressed with the trial judge (who allowed the prosecutors to get away with questionable strategies, discussed below),[20] the jurors,[21] and the insanity defense in Kansas, which did not take account of the rapid maturation of the field of

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[14] *Id.* at 116 (quoting from Haskel Frankel, *The Story of an American Tragedy*, SATURDAY REVIEW, Jan. 22, 1966, at 36 (interview of Capote)).

[15] George Plimpton, *The Story Behind a Nonfiction Novel*, N.Y. TIMES BOOK REVIEW, Jan. 16, 1966, at 2, 38.

[16] REED, *supra* note 8, at 107.

[17] *Id.* Capote showed it is "possible to view the Clutter murders as the logical outcome of sociological and psychological forces that had gained gradual momentum over the years." *Id.*

[18] *See* MARC WEINGARTEN, THE GANG THAT WOULDN'T WRITE STRAIGHT: WOLFE, THOMPSON, DIDION, AND THE NEW JOURNALISM REVOLUTION 33 (2006).

[19] GROBEL, *supra* note 11, at 119.

[20] *See* CAPOTE, *supra* note 2, at 266–68 (Judge Tate did not allow psychiatric evaluations of the defendants).

[21] *See id.* at 303 ("One juror . . . sat with drugged eyes and jaws so utterly ajar bees could have buzzed in and out.").

psychiatry.[22] Moreover, Capote suggests that the prosecutors were too zealous, and defense counsel not zealous enough, to ensure that the truth about the Clutter murders would come to light.

A. Prosecutors and Experts

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate . . . .[23]

After the arrest of defendants Perry Smith and Richard Hickock, who could not afford to hire counsel, Judge Roland H. Tate appointed Harrison Smith to represent Hickock and Arthur Fleming to represent Perry Smith.[24] Soon after the defendants' arraignment in Garden City, Kansas, defense counsel moved to urge the court to send the defendants to the state mental institution in Larned, Kansas, for a comprehensive psychiatric assessment of their sanity and their capacity "to comprehend their position and aid in their defense."[25] Harrison Smith had visited the facility and conferred with some of its staff, and he argued that there were "no qualified psychiatrists in our own community. . . . Larned . . . [has] doctors trained to make serious psychiatric evaluations. . . . [B]eing a state institution it won't cost the county a nickel."[26]

Logan Green, appointed as special assistant to prosecutor Duane West, opposed the motion:

> [He was] certain that "temporary insanity" was the defense his antagonists would attempt to sustain . . . [and he was afraid] that the ultimate outcome of the proposal would be, as he predicted in private conversation, the appearance on the witness stand of a "pack of head-healers" sympathetic to the defendants ("Those fellows, they're always crying over the killers. Never a thought for the victims").[27]

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22 *See id.* at 302.

23 MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2002, as amended, 2003).

24 CAPOTE, *supra* note 2, at 257.

25 *Id.* at 266 (quoting one of the appointed defense attorneys).

26 *Id.* at 267 (internal quotation marks omitted) (quoting defense attorney Harrison Smith).

27 *Id.* (quoting Logan Green).

Green pointed out that under the M'Naghten rule in Kansas, "if the accused knew the nature of his act, and knew it was wrong, then he is mentally competent."[28] Moreover, he argued that:

> [T]here was nothing in the Kansas statutes indicating that the physicians chosen to determine a defendant's mental condition must be of any particular qualification: "Just plain doctors. Medical doctors in general practice. That's all the law requires. . . . It's no great job to find whether a man is insane or an idiot or an imbecile . . . It is entirely unnecessary, a waste of time to send the defendants to Larned."[29]

Defense counsel Smith, in rebuttal, argued that psychiatry had "matured rapidly in the past twenty years," and that "we have a golden opportunity to face up to the new concepts in this field."[30] Judge Tate, in response, merely appointed "a commission of three Garden City doctors and direct[ed] them to pronounce a verdict upon the mental capacities of the prisoners. (In due course the medical trio met the accused and, after an hour or so of conversational prying, announced that neither man suffered from any mental disorder."[31] Harrison Smith, in defeat, arranged for Dr. W. Mitchell Jones (from Larned State Hospital) to meet with the defendants and testify if needed.[32]

At the defendants' trial, Dr. Jones was called as an expert, and Harrison Smith (following the M'Naghten Rule) asked if he had an opinion as to whether Hickock knew right from wrong at the time of the crime:[33]

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[28] *Id.*

[29] *Id.* (ellipsis in original) (quoting prosecutor Green). For a discussion of the M'Naghten Rule in Kansas at the time of the Clutter murders, see *State v. Boan*, 686 P.2d 160, 167 (Kan. 1984) (discussing two aspects of the M'Naghten Rule: a defendant is not criminally responsible if the defendant did not know (1) the nature and quality of the act, *or* (2) did not know "right from wrong with respect to the act"). Kansas abolished the insanity defense in 1996, but evidence of mental disorder can still be introduced to disprove criminal intent. KAN. STAT. ANN. § 22-3220 (1995); *see generally* Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW & HUM. BEHAV. 117, 127–31 (1999).

[30] CAPOTE, *supra* note 2, at 268 (quoting Smith) (Smith also argued that the "federal courts are beginning to keep in tune with this science as related to people charged with criminal offenses.").

[31] *Id.* (internal quotation marks omitted).

[32] *Id.* (Jones was "exceptionally competent; . . . a sophisticated specialist in criminal psychology and the criminally insane.").

[33] *Id.* at 293.

> "I think that within the usual definitions, Mr. Hickock did know right from wrong."
>
> Confined as he was by the M'Naghten Rule ("the usual definitions"), a formula quite color-blind to any gradations . . . , Dr. Jones was impotent to answer otherwise. . . . Hickock's attorney . . . hopelessly asked, "Can you qualify that answer?"
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> It was hopeless because . . . the prosecution was entitled to object—and did, citing the fact that Kansas law allowed nothing more than a yes or no reply . . . .[34]

Dr. Jones would have testified, Capote reports, that Hickock may have organic brain damage (from a serious head injury), and that tests should be done to determine whether such damage "might have substantially influenced his behavior . . . at the time of the crime."[35] Later in the trial, when Arthur Fleming called Dr. Jones to testify with respect to Perry Smith, Jones stated he had no opinion.[36] Fleming then said, "[y]ou may state to the jury why you have no opinion," but Green objected: "The man has no opinion, and that's *it*."[37] Again, Capote explains that Dr. Jones would have testified that while more extensive evaluation would be necessary, Perry Smith seemed to be a paranoid schizophrenic.[38]

In terms of legal ethics, any flaws in Kansas doctrine of insanity cannot be blamed on Logan Green. The only ethical question implied in Capote's account is whether the prosecution's handling of the insanity defense was somehow inappropriate. However, the special responsibilities of a prosecutor do not appear to have been neglected: the charge was supported by probable cause, the defendants had counsel (and neither their initial waivers of counsel nor their waivers of a preliminary hearing had been sought by the prosecution), and no mitigating evidence was withheld from the defense.[39] These

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34 *Id.* at 294.

35 *Id.* at 294–95.

36 *Id.* at 296.

37 *Id.*

38 *Id.* at 298 (noting that Dr. Joseph Satten, a "widely respected veteran in the field of forensic psychiatry" on the staff of the Menniger Clinic in Topeka, consulted with Jones "and endorsed his evaluations of Hickock and Smith").

39 See, for example, MODEL CODE OF PROF'L CONDUCT R. 3.8 (2002, as amended, 2003), which provides that:

> The prosecutor in a criminal case shall:
>
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

matters were addressed in federal habeas corpus proceedings following the conviction of the defendants.[40] On appeal from the district court's denial of the petitions, the appellate court ruled:

> [After their arrest,] each petitioner was fully advised of his rights, including the right of representation by counsel . . . .
> . . . [Their] confessions were . . . voluntary . . . . They were advised by the judge that they were entitled to a preliminary hearing . . . . [S]uch hearing was waived.[41]

As to the prosecutor's opposition to the request that the defendants undergo psychiatric examinations at Larned, the court noted that the defendants were examined "by a panel of 3 doctors as provided for by Kansas Statute."[42] Finally, the court observed:

> There was no substantial evidence then, and none has been produced since the trial, to substantiate a defense of insanity. The attempt to establish insanity as a defense because of serious injuries in accidents years before, and headaches and occasional fainting spells of Hickock was like grasping at the proverbial straw.[43]

Capote, in his account of the trial, includes evidence of insanity that did not make it into the trial record because of the limitations of the M'Naghten Rule,[44] but his suggestion of injustice does not seem to implicate the prosecutor's special ethical responsibilities.[45]

Capote also implies, however, that because Logan Green "feared" the prospect of defense experts and "predicted" their sympathetic testimony, Green knew that the three local

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(b) make reasonable efforts to assure that the accused . . . has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence . . . known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . .

40 CAPOTE, *supra* note 2, at 327.

41 Hickock v. Crouse (*Hickock IV*), 334 F.2d 95, 97–98 (10th Cir. 1964) (footnote omitted) (consolidated with Smith v. Crouse).

42 *Id.* at 99–100 n.7 (referring to KAN. GEN STAT. § 62-1531).

43 *Id.* at 99.

44 *See* CAPOTE, *supra* note 2, at 294–95 (regarding Hickock's severe character disorder); *id.* at 296–302 (suggesting that Perry Smith may have lapsed into a dreamlike dissociative trance or a mental eclipse when he attacked Mr. Clutter).

45 *See id.* at 267–68.

physicians who determined the defendants' sanity were wrong.[46] ABA Model Rule 3.3(a)(3) provides that a lawyer cannot knowingly "offer evidence that the lawyer knows to be false."[47] However, this is a notoriously low standard for policing bad evidence, because "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."[48] Nevertheless, a "lawyer's knowledge that evidence is false . . . can be inferred from the circumstances," and a "lawyer cannot ignore an obvious falsehood."[49] But if Green genuinely believed that "[i]t's no great job to find whether a man is insane," and that it would have been a "waste of time" to engage in comprehensive psychiatric examinations of the defendants,[50] then he would not have *known*, even if he reasonably believed, that the defendants were insane. We simply do not require attorneys to know, in a battle of medical experts, which physician or psychiatrist is telling the truth.[51] Moreover, the dismissive language in the habeas corpus appeal (to the U.S. Court of Appeals for the Tenth Circuit), with respect to the insanity plea, did not suggest any prosecutorial misconduct.[52]

B. Defense Counsel and Fair Trials

> Everett Steerman, Chairman of the Legal Aid Committee of the Kansas State Bar Association, was disturbed by . . . allegations . . . that [the defendants] had not had a fair trial. . . .
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> . . . [The defendants complained that their] two defense attorneys, Arthur Fleming and Harrison Smith, whose "incompetence and inadequacy" were the chief cause of [their convictions, had offered] no real defense . . . and this lack of

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46 *See id.* at 267.

47 MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002, as amended, 2003).

48 *Id.* cmt. 8.

49 *Id.*

50 CAPOTE, *supra* note 2, at 267.

51 *See generally* David S. Caudill, *Advocacy, Witnesses, and the Limits of Scientific Knowledge: Is There an Ethical Duty to Evaluate Your Expert's Testimony*?, 39 IDAHO L. REV. 341, 343–48 (2003). "Even scientists disagree about the validity of many hypotheses. Thus, it hardly makes sense to require that lawyers make evaluations of scientific validity, or to assume that lawyers know when a hypothesis is 'true.'" *Id.* at 348.

52 *See supra* notes 36–37 and accompanying text. The court also observed: "The defendants did not testify and their defense was limited to a report of a psychiatrist who had examined them, and who stated that Hickock knew right from wrong, but he had no opinion as to Smith." *Hickock IV*, 334 F.2d 95, 99 (10th Cir. 1964).

> effort . . . had been deliberate—an act of collusion between the defense and the prosecution.[53]

The Kansas Supreme Court, on July 8, 1961, affirmed the judgments rendered and death sentences imposed on the defendants.[54] Fleming was Perry Smith's attorney on the joint appeal from the verdicts of guilt, while Hickock was appointed new counsel because Harrison Smith became Finney County Attorney in January 1961.[55] Claims of error included the refusal to appoint a psychiatrist to the commission examining the defendants, failure to recognize the claims of temporary insanity, setting the trial date just after the Clutter estate auction, and failure to grant a change of venue (which had not been requested).[56] After the convictions were affirmed, motions for rehearing were filed, but the Kansas Supreme Court "immediately . . . began to receive letters from the petitioners complaining about the court-appointed counsel. Soon the court was informed that counsel had been discharged. In a short time petitioners were writing to various legal aid groups in Kansas seeking counsel."[57]

The Wichita Bar Association legal aid committee asked attorney Russell Shultz to investigate the situation, and Shultz asked for a delay in the disposal of the motion for rehearing, which the court granted while requesting a copy of his report when completed.[58] The report disturbed the court, and after Schultz was appointed to bring habeas proceedings, retired Justice Thiele was appointed as a commissioner to take evidence and produce another report.[59] The latter report was adopted by the Kansas Supreme Court in its opinion denying the writ.[60] Shultz was recognized for giving his time to represent the petitioners, but his charges that appointed counsel were incompetent and their representation inadequate (for failing to meet enough with the defendants, to seek a change of venue, to

53 CAPOTE, *supra* note 2, at 325–26.

54 State v. Hickock (*Hickock I*), 363 P.2d 541 (Kan. 1961), *cert. denied*, 373 U.S. 544 (1963).

55 Hickock v. Hand (*Hickock II*), 373 P.2d 206, 213 (Kan. 1962).

56 *Hickock I*, 363 P.2d at 546–49.

57 *Hickock II*, 373 P.2d at 208.

58 *Id.*

59 *Id.*

60 *See id.* at 208–16.

seek separate trials, to object to certain jurors, and to introduce evidence) were rejected.[61]

Just before the hearing on the writ of habeas corpus in the Kansas Supreme Court, Perry Smith criticized Shultz and moved to have new counsel (namely a penitentiary inmate, who was rejected for not being a member of the bar).[62] Capote was also, though somewhat guardedly, critical of Shultz.[63]

> It would appear that Shultz's investigation was rather one-sided, since it consisted of little more than an interview with Smith and Hickock, from which the lawyer emerged with crusading phrases for the press: "The question is this—do poor, plainly guilty defendants have a right to a complete defense? I do not believe that the State of Kansas would be either greatly or for long harmed by the death of these appellants. But I do not believe it could ever recover from the death of due process."[64]

In the commission hearing before retired Justice Thiele, Shultz emphasized the failure to request a change of venue,[65] and suggested that "because of community pressure, Fleming and Smith had deliberately neglected their duties"[66] by failing to meet sufficiently with their clients, by waiving a preliminary hearing (the attorneys, however, had not yet been appointed), by making damaging statements to the press concerning the defendant's guilt (Harrison Smith denied the newspaper quotes), and by "failing to prepare a proper defense."[67]

After the state's denial of the defendants' writs of habeas corpus, Hickock's new counsel Joseph Jenkins brought a petition for writ of certiorari to the U.S. Supreme Court (denied in February 1963),[68] and also (together with Perry Smith's new counsel, Robert Bingham) habeas proceedings in the U.S. District Court for Kansas.[69] The habeas petitions were denied, and on appeal to the Tenth Circuit, those denials were affirmed:

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61 *See id.*

62 *Id.* at 208.

63 *See* CAPOTE, *supra* note 2, at 326–27.

64 *Id.*

65 *Id.* at 328 (Arthur Fleming responded that he felt the opposition to the death penalty by some local ministers might make many jurors "inclined to be lenient.").

66 *Id.*

67 *Id.* at 328–29.

68 *See* Hickock v. Crouse (*Hickock III*), 372 U.S. 924 (1963).

69 See *Hickock IV*, 344 F.2d at 95, 96 (10th Cir. 1964) (the defendants' actions were consolidated). Jenkins and Bingham were appointed by the U.S. District

> [Jenkins and Bingham] have prosecuted [their] petitions with commendable vigor. It is quite obvious [that] . . . the present attorneys are convinced that due to local prejudice and pressure the appointed attorneys . . . during the trial did little or nothing to protect [the defendants'] rights. . . . We think, however, that these attorneys . . . have lost sight of the problems which confronted attorneys Smith and Fleming . . . . [E]ach petitioner had made a full [and voluntary] confession . . . . Under these circumstances, they would have been justified in advising that petitioners enter pleas of guilty and throw themselves on the mercy of the court.[70]

Good-faith representation, the court continued, "does not contemplate that miracles will be performed,"[71] and the decisions not to request a change of venue, not to object during a trial, and not to "resist the introduction of the confession in evidence" do not necessarily suggest incompetence.[72] On appeal from the Tenth Circuit, the defendants' petitions for writs of certiorari and for rehearing were denied.[73]

The requirement that lawyers provide competent representation is ambiguous enough to support the various courts' and the commission's conclusions that Harrison Smith and Arthur Fleming provided an adequate defense.[74] Harrison Smith had twenty-four years of experience, and Fleming about forty, in their Kansas law practices.[75] Capote points out, however, that Shultz's "principal objective," in asking these attorneys why they did not request a change of venue, was "to discredit them and prove that they had not supplied their clients with the minimum protection."[76] But they "withstood the onslaught in good style, particularly Fleming," who explained why he had not done so.[77] Even the failure to demand separate trials was explainable (whoever was tried first might become a witness against the other), and the failure to demand a record of

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Court in response to letters from the defendants after state remedies had been exhausted. *Id.* at 99.

70 *Id.* at 99–100.

71 *Id.* at 101.

72 *Id*. at 100–02.

73 Hickock v. Crouse (*Hickock V*), 379 U.S. 982 (1965) (cert. denied), *reh'g denied*, 380 U.S. 928 (1965).

74 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002, as amended, 2003).

75 *Hickock IV*, 334 F.2d at 98.

76 *See* CAPOTE, *supra* note 2, at 328.

77 *Id.* (Fleming felt there was some aversion to capital punishment in the community, more "than perhaps in other parts of the state.").

voir dire was not prejudicial because "all of the jurors who served at the trial" were called as witnesses at the commission hearing.[78] Seeming incompetence was never translated into actual incompetence despite a great deal of scrutiny.

Although the term was never used in Capote's account or in the various proceedings that considered the fairness of the murder trial, there was also a charge of conflict of interest brought against Fleming and Smith.[79] Rule 1.7 of the ABA Model Rules provides that a lawyer shall not represent a client if "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer."[80] There is an exception if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to [the] affected client," *and* the affected "client gives informed consent, confirmed in writing."[81] Capote writes that underlying all of Shultz's charges, including the failure to consult with the defendants sufficiently, making damaging remarks to "newsmen," and "failing to prepare a proper defense," was "the implication that because of community pressure, Fleming and Smith had deliberately neglected their duties."[82] And Jenkins and Bingham, in their federal habeas proceedings, were convinced that:

> [D]ue to local prejudice and pressure the appointed attorneys representing the petitioners prior to and during the trial did little or nothing to protect their rights. As a result, they contend the petitioners did not have a constitutionally fair trial, and in addition that the defense offered [by appointed counsel] was a reflection upon the integrity of the Kansas bar . . . .[83]

Both Fleming and Harrison Smith had resisted their appointments, and Harrison Smith even said he doubted that doing his best would "make me too popular around here," but both felt obligated to serve.[84] Whether they bowed to community pressure is left for the reader of *In Cold Blood*, and of the various hearings on the fairness of the trial, to decide.

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78 *Hickock II*, 373 P.2d 206, 212 (Kan. 1962).

79 *See infra* notes 82–84 and accompanying text.

80 MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2002, as amended, 2003).

81 MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1), (4).

82 *See* CAPOTE, *supra* note 2, at 328–29.

83 *Hickock IV*, 334 F.2d 95, 99 (10th Cir. 1964).

84 CAPOTE, *supra* note 2, at 257 (quoting Harrison Smith).

While Hickock experienced a "hostile atmosphere" in Garden City, Judge Tate testified after the trial:

> It is my opinion that the attitude toward [the defendants] was that of anyone else charged with a criminal offense—that they should be tried as the law provides; that if they were guilty they should be convicted; that they should be given the same fair treatment as any other person. There was no prejudice against them because they were accused of crime.[85]

That seemingly Pollyanna-ish assessment undoubtedly helped the "imperiled" careers of Judge Tate as well as Arthur Fleming and Harrison Smith "because of the apparent credit the Bar Association bestowed upon" the allegations of the defendants.[86]

Finally, Capote's account of the challenges faced by Fleming and Smith includes Shultz's question to Harrison Smith concerning statements to the press: "Are you aware that a reporter, Ron Kull of the Topeka *Daily Capital*, quoted you, on the second day of the trial, as saying there was no doubt of Mr. Hickock's guilt, but that you were concerned only with obtaining life imprisonment rather than the death penalty?"[87] Rule 3.6(a) of the ABA Model Rules prohibits any "extrajudicial statement that the lawyer knows or reasonably should know will be disseminated . . . and will have a substantial likelihood of materially prejudicing" a trial in the matter.[88] "Any opinion as to the guilt or innocence of a defendant . . . in a criminal case" is identified in the comments to Rule 3.6 as "more likely than not to have a material prejudicial effect," so there is little doubt as to the impropriety of such a statement.[89] Harrison Smith, however, denied making the statement: "If I was quoted as saying that it was incorrect."[90]

While Capote does not focus on the rules of professional conduct in his account, *In Cold Blood* easily functions as a point of reflection on the ethics of lawyering. Its vignettes of attorneys in action are especially relevant because of their recency and actuality in Capote's "true account." However, it is the status of Capote's account as "truthful" that suggests another reason to

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85 *Id.* at 328 (quoting Judge Tate).

86 *Id.* at 327.

87 *Id.* at 329 (quoting Russell Schultz) (internal quotation marks omitted).

88 MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2002, as amended, 2003).

89 *Id.* cmt. 5.

90 *See* CAPOTE, *supra* note 2, at 329 (quoting Harrison Smith).

include *In Cold Blood* in the canon of law and literature studies. As persuasive storytellers bound by the obligation to tell the truth in a trial,[91] lawyers risk making the same errors of which Capote is accused.

II
LAWYERS AS STORYTELLERS
A. Fact, Fiction, Faction

> The decision [to write *In Cold Blood*] was based on a theory I've harbored since I first began to write professionally . . . . It seemed to me that journalism, reportage, could be forced to yield a serious new art form: the "nonfiction novel," as I thought of it. Several admirable reporters—Rebecca West for one, Joseph Mitchell and Lillian Ross—have shown the possibilities of narrative reportage . . . .[92]

The substantial literature concerning Capote's role in creating, sustaining, or even giving a bad name to the various movements termed narrative reportage, New Journalism, and creative or literary journalism is beyond the scope of this article. However, some brief background and a few comparisons help illuminate the ethical controversies that followed the alleged invention of the "nonfiction novel." Capote mentions Rebecca West, who admired *In Cold Blood* as a "grave and reverend book,"[93] and whose own work included crime and trials reportage.[94] The similarities of *In Cold Blood* with, for example, West's report of a brutal "torso murder" in England (entitled *Mr. Setty and Mr. Hume*), are apparent.[95] While West's fiction has been criticized ("only one [of her nine novels is] worth reading today"),[96] her journalistic art is considered superb. Her

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91 MODEL RULES OF PROF'L CONDUCT R. 3.3(a) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . . .").

92 PLIMPTON, TRUMAN CAPOTE, *supra* note 3, at 197 (quoting Capote in an interview).

93 Rebecca West, *A Grave and Reverend Book*, HARPER'S MAGAZINE, Feb. 1966, at 108, 114 (review of *In Cold Blood*).

94 *See* REBECCA WEST, THE MEANING OF TREASON (Viking Press 1947) (1945); REBECCA WEST, A TRAIN OF POWDER (1955) (including a three-part essay on the Nuremburg trials, and essays on two murder trials and an espionage trial).

95 *See* Rebecca West, *Mr. Setty and Mr. Hume*, *in* A TRAIN OF POWDER, *supra* note 94, at 165–230.

96 Pearl K. Bell, *Duchess of Letters*, THE NEW REPUBLIC, Apr. 22, 1985, at 33 (book review of REBECCA WEST, THIS REAL NIGHT (1984)).

abundant strength as a novelist "to tell an absorbing story and to portray the intricacies of human character . . . flowered in her journalism . . . [but] not in her novels."[97] Perhaps her "art needed the steel scaffolding of facts on which to build the unique structure of narrative and ideas she fills with human beings who convince us in every word and look that this was how they were, and not otherwise."[98]

Thus her "ruthlessly observant" account of a murder case in *Mr. Setty and Mr. Hume* is "packed with unforgettable sketches of the people she encountered in her slow retracing of what actually happened."[99] Even West, however, as Capote would later be, was accused of lacking "the kind of truth which is finally supplied only by simple warmth and compassion—the wall of her superior powers would seem to rise between Miss West and these suffering human beings."[100] Notwithstanding the similarities between Capote and West, and her admiration of *In Cold Blood*, Capote dismissed West as "always a good reporter" but "never really using the form of creative reportage because the form, by necessity, demands that the writer be completely in control of fictional techniques—which means that, to be a good creative reporter, you have to be a very good fiction writer."[101] Those "fiction" skills, however, would haunt Capote when he was later accused of blending fact and fiction, criticism of which is discussed in detail below.

Another helpful comparison is the New Journalism of Tom Wolfe, who included Capote in his anthology of New Journalists.[102] Combining "the skills and stamina of an ace

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97 *Id.*

98 *Id.* (quoting Mollie Panter-Downes). "[N]owhere could she have found a better locus for her gifts than in a court of law. Her fondness for windy generalities and hortatory moralism was kept in check by the slow day-to-day unwinding of the legal process of justice." *Id.* at 35.

99 *Id.*

100 Diana Trilling, *A Symbol of Reason*, N.Y. TIMES, March 20, 1955, at 3 (reviewing *A Train of Powder*). Capote was accused of "winning the friendship" of Smith and Hickock, "and then failing to help them." TOM GOLDSTEIN, THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS 27 (1985) (citing Kenneth Tynan, *Weekend Review*, SUNDAY OBSERVER, March 13, 1966, at 1 (review of *In Cold Blood*)). Capote did "less than he might have done to save them." *Id.* at 28.

101 Plimpton, *The Story Behind a Nonfiction Novel*, *supra* note 15, at 2 (interview with Capote).

102 TOM WOLFE, THE NEW JOURNALISM 116–26 (1973). Part I of *The New Journalism* is a three-part essay by Tom Wolfe entitled *The New Journalism*, *id.* at

reporter with the techniques of fiction,"[103] Tom Wolfe and his fellow New Journalists wrote "journalism that would . . . read like a novel."[104] Significantly, when asked about New Journalism, Capote distanced himself from "Tom Wolfe, and that crowd," and claimed that:

> [T]hey have nothing to do with creative journalism—in the sense that I use the term—because neither [James Breslin nor Tom Wolfe], nor any of that school of reporting, have the proper fictional technical equipment. It's useless for a writer whose talent is essentially journalistic to attempt creative reportage, because it simply won't work.[105]

Wolfe, on the other hand, closely aligns New Journalism with the literary devices of scene-by-scene construction (avoiding sheer historical narrative), offering dialogue in full, using third-person point of view, and recording minute details, all in the realist tradition of Dickens, Balzac, Fielding, Trollope, and Smollett.[106] Whether this is new is therefore often debated,[107] but the concern of many journalist critics is that despite the careful and extensive research of writers like Wolfe and Capote, they add too much to the story. For example:

> The mid-1960s brought New Journalism, or at least a new label and newfound popularity to an old technique: intermingling fact with fiction. . . . *Harper's Magazine* tried defining New Journalism metaphorically as "somewhere west of journalism and this side of history," the "place where reporting becomes literature." In this uncharted territory, writers embellished quotes, burrowed into characters' interior thoughts, created scenes that may have happened but did not, and made up characters who were collages of real people.

3–54, Part II is the anthology edited by Tom Wolfe and E.W. Johnson with select work of twenty-three writers, including Norman Mailer, Terry Southern, Gay Talese, and Hunter S. Thompson, *id.* at 55–394.

103 R.Z. Sheppard, *The Haves and the Have-Mores*, TIME, Nov. 9, 1987, at 101, 101 (review of TOM WOLFE, THE BONFIRE OF THE VANITIES (1987)).

104 WOLFE, *supra* note 102, at 9 (ellipsis in original).

105 Plimpton, *The Story Behind a Nonfiction Novel*, *supra* note 15, at 2. Wolfe notes that notwithstanding Capote's criticism of the New Journalism, "his success gave [it] . . . an overwhelming momentum." WOLFE, *supra* note 102, at 26.

106 WOLFE, *supra* note 102, at 31–33.

107 *Compare* George A. Hough III, *How "New"?*, *in* NEW JOURNALISM 16 (M. Fishwick ed., 1975); *with* WEINGARTEN, *supra* note 18, at 8.

> Among the leading practitioners were Tom Wolfe, Gay Talese, Norman Mailer and Truman Capote.[108]

Wolfe, conversely, believed that modern journalism bored readers "to tears without understanding why. . . . To avoid this I would try anything."[109]

When Wolfe wrote his first novel, *The Bonfire of the Vanities*,[110] it was not so much a break with New Journalism as "an experiment in radically journalistic fiction" that was true to the movement; it implied "a claim that all this has been observed rather than created."[111] His portrayal of New York society is so accurate and devastating[112] that:

> [To] call *The Bonfire of the Vanities* Wolfe's first novel is to make a distinction without too much difference. The ingeniously rigged plot is clearly fictional, but the details of New York City life, high and low, leap from the legman's notebook. . . . The crucial change was to make the leading character a Wall Street broker . . . . The alteration meant that Wolfe had to study the breed in its habitat, to examine its plumage, to listen to the roar of "well-educated young white men baying for money."[113]

To those who might claim Wolfe exaggerates, he replies: "'If you don't think this is a correct picture of New York today, then do your own reporting. I say you'll come back with what I did.'"[114] Moreover, Wolfe explains, those "things that strike people as mockery or hyperbole were, to me, instances of barely

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108 GOLDSTEIN, *supra* note 100, at 211. Wolfe remarks that his own initial reaction to Gay Talese's *Esquire* article on Joe Louis, which read like a short story, was similar:

> *What the hell is going on?* . . . My instinctive, defensive reaction was that the man had . . . made up the dialogue . . . maybe he made up whole scenes . . . . [T]hat was precisely the reaction that countless journalists and literary intellectuals would have over the next nine years as the New Journalism picked up momentum.

WOLFE, *supra* note 102, at 11.

109 *Id.* at 17–18.

110 WOLFE, *supra* note 103.

111 *See* Richard Vigilante, *The Truth About Tom Wolfe*, NAT'L REV., Dec. 18, 1987, at 46, 48 (book review of *The Bonfire of the Vanities*).

112 *See id.*

113 Sheppard, *supra* note 103, at 101 (quoting *The Bonfire of the Vanities*).

114 Hillary DeVries, *The Police Reporter at the Garden Party*, CHRISTIAN SCIENCE MONITOR, Dec. 14, 1987, at 6, *reprinted in* CONVERSATIONS WITH TOM WOLFE 241, 243 (Dorothy M. Scura ed., 1990).

being able to keep abreast of what was occurring."[115] Even so, Wolfe did not claim, as Capote did with respect to *In Cold Blood*, that he intended to write "a book that would read exactly like a novel except that every word of it would be absolutely true."[116]

B. Capote and Journalism

> [*In Cold Blood*] helped show journalists the possibility of using creative writing techniques while holding to the guidelines of journalism; something now commonly seen . . . [because] many view the style as crucial to keeping readers.[117]

In Cold Blood was the subject of great praise, a "chilling masterpiece," and Capote has been considered a near-genius for his "severe control . . . . without morose moralizing," for choosing "precisely the right vocabulary," for managing the horror "without collapsing into bathos," and for "pioneering . . . a new style of novel writing."[118] He was also considered "a creative, but still objective reporter" who brought the imaginative "techniques of a fiction writer . . . to the cause of his reporting."[119] From an ethical perspective, however, two concerns persist with respect to *In Cold Blood*.

First, and only peripheral to the focus of this Article, is the convergence of amoralism, questionable journalistic techniques, and personal ambition or careerism within Capote as he researched and wrote *In Cold Blood*. This convergence is the subject of the films *Capote* and *Infamous*.[120] The "cunning tricks

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115 *Id.*

116 GROBEL, *supra* note 11, at 112.

117 Van Jensen, *Writing History: Capote's Novel Has a Lasting Effect on Journalism*, LJWORLD.COM, April 3, 2005, www.2.ljworld.com/news/2005/apr/03/writing_history_capotes.

118 James A. Michener, *Foreword*, to GROBEL, *supra* note 11, at 10.

119 REED, *supra* note 8, at 119–20.

120 Prairie Miller, *Infamous: Truman Capote in Cold Blooded Media Seduction*, WBAI ARTS MAGAZINE, http://www.wbai.org/index.php?option=com_content&task=view&id=9165&itemid=2.

> [T]he most scathing examination of US culture in Infamous, settles on issues of ethics versus personal ambition and careerism. As Capote feigns sympathy and a supportive emotional bonding with Smith in the bid of the accused man for a life sentence, he harbors at the same time a secret desire that Smith be executed as quickly as possible. Not due to any personal belief in the death penalty, but rather in order to provide a potent finale to his book in an impatient bid for a bestseller.

Truman Capote used to obtain the information he needed" has been called the second crime in *In Cold Blood*,[121] and Capote's alleged remark, that he could "hardly wait" until "they're executed" so that the book could be published, is unforgettable.[122] For some journalists, such behavior exemplifies the failure of journalistic ethics:

> If there is a scandal in the making of the best-selling non-fiction book of 1966, it's not about the facts contained in the 368 pages of Truman Capote's *In Cold Blood*. Virtually every detail about the brutal murder of the Clutter family has stood up to forty years of scrutiny. When it comes to Capote, the devil is not in the details; it's in how he got to those details in the first place.[123]

Others, however, are less comfortable with the accuracy of Capote's "details," and for them the scandal of Capote's unscrupulousness should not eclipse the second ethical controversy, namely the scandal of the fictional aspects of *In Cold Blood*.

Before turning to the problem of accuracy in Capote's storytelling techniques and its parallel in trial advocacy, it bears mention that the notion of unethically betraying an informant's trust, in journalism, has a parallel in the professional regulation of conflicts of interests for lawyers. Consider that Capote is virtually blamed for the duplicity of contemporary "true crime" authors[124]—for example, convicted murderer Jeffrey MacDonald claimed that Joe McGinnis "inveigled his way into [MacDonald's] confidence, gaining unique access to his personal

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Id.; *see also* Kermode, *supra* note 1.

> [In the film Capote,] Capote's relationship with murderer Perry Smith is depicted in all of self-serving strangeness, with the writer first falling in love with his subject . . . then later abandoning him and longing for his execution in order that he may finish his wretched book.
>
> In one key scene, Capote is seen lying to Smith about the title of his magnum opus, claiming that In Cold Blood is just a publisher's puff.

Id.

121 Emmanuel Burdeau, *The Writing of Crimes*, CAHIERS DU CINÉMA, (Sally Shafto trans.), March 2006, http://www.cahiersducinema.com/article695.html.

122 PLIMPTON, *supra* note 3, at 215 (quoting Ned Rorem who heard Capote say, "it can't be published until they're executed, so I can hardly wait").

123 Klein, *supra* note 7.

124 See, for example, Kermode, *supra* note 1, with the title: *Truman Capote, You've Got a Lot to Answer for* and Klein, *supra* note 7, who states that *Capote*, the film, represents "the beginning of the end, the top of that slippery slope down which the profession of journalism has slid." *Id.*

life under the guise of writing a sympathetic account of his innocence, while, in fact, penning a damning indictment of his guilt."[125] The ethical dilemma of author-lawyers who become "true crime" reporters of their client's experiences in court arises from the same risk of duplicity. Rule 1.8 of the ABA Model Rules prohibits negotiation, prior to the conclusion of representation, of "an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."[126] The comments to that rule confirm the "conflict between the interests of the client and the personal interests of the lawyer," and that those actions "suitable in the representation of the client may detract from the publication value of an account of the representation."[127] While unethical journalists have to work to gain a subject's trust before obtaining access to materials that they could use to betray their subject, attorneys have ready-made access due to the trust that characterizes attorney-client relations. The idea that an attorney may refrain from taking actions that would benefit a client, in order to make the lawyer's forthcoming book more exciting, is actually illustrated by the accusation that the wealthy Capote had the resources to help Smith and Hickock by providing them better counsel—"$50,000 might have saved them . . . only the poor must hang"—but he did not in order to speed both their execution and completion of the book.[128] That said, the more striking parallel between Capote's construction of *In Cold Blood* and the ethical obligations of lawyers lies in the nature of nonfiction storytelling techniques.

As depicted in the film *Capote*, Truman Capote was famous (or infamous) for his claim that he could "transcribe conversation without using a tape recorder . . . . I could get within 95 percent of absolute accuracy, which is as close as you need."[129] When challenged concerning the accuracy of the details in *In Cold Blood*, Capote replied: "One doesn't spend almost six years on a book, the point of which is factual accuracy, and then give way to minor distortions. People are so

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125 Kermode, *supra* note 1 (including other examples of authors who owe a debt to *In Cold Blood*).

126 MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2002, as amended, 2003).

127 *Id.* cmt. 9.

128 PLIMPTON, TRUMAN CAPOTE, *supra* note 3, at 215 (quoting Ned Rorem).

129 *Id*. at 202 (quoting Capote in an interview).

suspicious. . . . All of [*In Cold Blood*] is reconstructed from the evidence of witnesses . . . ."[130]

Even biographer and apologist Kenneth Reed was not disturbed by the charges that Capote blended fact and fiction:

> Capote had managed to orchestrate the story of the Clutter murders, not through the distortion of fact, but by the reordering and proportioning of it. . . . [W]hile the reader can depend upon the high degree of accuracy in Capote's documentation, it should be borne in mind that the selectivity of detail and the particular points singled out for emphasis are elements left to the discretion of the artist himself.[131]

But that is not the end of the story. Contemporary assessments typically concede that:

> Capote blurred the line between truth and untruth, despite his claims of impeccable accuracy. His embellishments—which vary from allegedly misquoting people to making composite characters to ending the book with a scene that never happened—have bred ill will from some in the book who felt falsely portrayed and distrust from readers who, upon learning of Capote's changes, are left to wonder where reality ends and fiction begins.[132]

It was Phillip K. Tompkins' 1966 *Esquire* article, entitled *In Cold Fact*, that catalogued Capote's inaccuracies[133] and caused some readers, who "would have had no problems . . . if Capote had not claimed that he never strayed from the truth," to "wonder whether any of the inconsistencies are important."[134] And Bill Brown, the former editor of the *Garden City Telegram* who was "enlisted to help [Capote] track down interview sources,"[135] "thought that Capote's portrayal of the Clutter[] [family] was so off the mark as to be virtually unrecognizable."[136]

Numerous individuals portrayed in *In Cold Blood* have questioned Capote's recollections of their meetings with the author.[137] Duane West, the lead prosecutor who tried the

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130 *Id.* at 207–08.

131 REED, *supra* note 8, at 112.

132 Jensen, *supra* note 117.

133 Phillip K. Tompkins, *In Cold Fact*, ESQUIRE, June 1966, at 125.

134 Esther G. Spurrill, *Truth, Better Than Fiction: How "In Cold Fact" by Phillip K. Tompkins Changed My Opinion of In Cold Blood by Truman Capote*, AUTHORSDEN, Feb. 23, 2002, http://authorsden.com/visit/viewarticle.asp?id=4155.

135 WEINGARTEN, *supra* note 18, at 31.

136 *Id.* at 34.

137 *See generally* Tompkins, *supra* note 133.

Clutter case, later complained that he had been portrayed unjustly and "grievously underrepresented" in *In Cold Blood*.[138] Logan Green is presented as responsible for the convictions, and West appears to be "playing second fiddle."[139] West said:

> I've heard various people say that Truman didn't quote them correctly. . . . I know he mistakenly described my part in the book. . . . I handled all the investigation, worked with the investigators, prepared the trial brief, handled all the evidence . . . . Mr. Green was hired to assist me . . . . I made the opening statement to the jury. Truman took part of what I said and attributed it to Mr. Green. . . . This business of a new art form—"nonfiction novel"—is a bunch of *garbage*.[140]

Similar complaints were made by Kansas Bureau of Investigation agent Harold Nye.[141] Capote sent some galleys from *In Cold Blood* for approval, but Nye called the work "a fiction thing," and refused to approve the galleys because Capote "didn't tell the truth."[142]

> What he did was to take this lady who ran the little apartment house . . . where Perry Smith had been, and fictionalize her way out of character. Accuracy was not his point. . . . I was under the impression that the book was going to be factual, and it . . . was a fiction book.[143]

Even as Capote was being accused of taking "the latitude of the fiction writer," a technique he associated with the "documentary novel—a popular and interesting but impure genre," he insisted that his "nonfiction novel" had the distinction of combining "the persuasiveness of fact" with "the poetic attitude fiction is capable of reaching."[144]

Trial lawyers, in their opening and closing statements, are storytellers who likewise hope to combine persuasive facts with compelling narrative techniques. Moreover, as advocates, they need not pretend to be completely objective, which suggests a parallel with New Journalists and even Capote (whose claims of

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138 Patrick Smith, *An Outspoken Critic: Former Prosecutor Says Capote Misrepresented Him*, LJWORLD.COM, April 5, 2005, http://www2.ljworld.com/news/2005/apr/05/an_outspoken_critic/.

139 *Id.*

140 PLIMPTON, TRUMAN CAPOTE, *supra* note 3, at 221–22 (quoting Duane West).

141 *Id.* at 175.

142 *Id.* (quoting Harold Nye).

143 *Id.* (quoting Harold Nye).

144 Plimpton, *The Story Behind a Nonfiction Novel*, *supra* note 15, at 3 (stating that the documentary novelist "lets his imagination run riot over the facts").

objectivity[145] are belied by his seeming, perhaps unconscious, advocacy for the murderers). "While the New Journalists are not the first to recognize the difficulty of being 'objective,' they do articulate the problem more zealously than their predecessors. They question what constitutes objectivity and whether it is even desirable. Their criticism essentially focuses on . . . time-honored assumptions underlying traditional journalism."[146] For example, New Journalists view "neutrality as an impotent response to social problems," and believe that the attempt to be detached and impersonal "leads to sterile, meaningless, and often misleading journalism."[147] In short, the "canons of objectivity . . . function to insulate the truth."[148] The contrast of truth with objectivity is evocative of the role of legal advocates, where objectivity is excused but where truth becomes the ethical limit on advocacy.

C. The Ethics of Opening and Closing Statements

> [Capote:] What I think is that reporting can be made *as* interesting as fiction, and done *as* artistically . . . .
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> . . . .
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> [Plimpton:] . . . I suppose the temptation to fictionalize events, or a line of dialogue, . . . must be at times overwhelming. With "In Cold Blood" was there any invention of this sort to speak of—I was thinking specifically of the dog you described trotting along the road . . . [and] Dick [Hickock, when on the run with Perry Smith,] swerving to hit the dog. Was there actually a dog at that exact point in the narrative, or were you using . . . a fiction device . . . ?
>
> [Capote:] No. There was a dog, and it was precisely as described.[149]

If the goal of the nonfiction novel is to both (i) maintain journalistic accuracy (avoiding the distortion of facts) and (ii) to create a work of art by "reordering" and "proportioning" the facts (selecting the right details and singling out "the particular points . . . for emphasis"), then the genre is familiar ground for

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145 *See supra* notes 12–15 and accompanying text.

146 Richard A. Kallan, *Entrance*, *in* NEW JOURNALISM, *supra* note 107, at 8, 9.

147 *Id.*

148 *Id.* Indeed, even Capote said that the reporter, "above all, . . . must be able to empathize with personalities outside his usual imaginative range." *See* Plimpton, *The Story Behind a Nonfiction Novel*, *supra* note 15, at 2.

149 Plimpton, *The Story Behind a Nonfiction Novel*, *supra* note 15, at 2, 41 (interview with Capote).

trial attorneys.[150] Law libraries are the repositories for hundreds of books on the art of advocacy, and few do not extol the virtues of storytelling techniques. "After all, what is a trial? It is two parties, each telling its story and asking society to endorse its version of reality. . . . Through the construction of stories jurors can organize and analyze the vast amount of information involved in making legal judgments."[151] Story construction has been called "framing" of ambiguous material in a competition over authority,[152] and while good lawyers attend to the evidence and the law:

> [T]hey reach beyond these givens to the circumstances . . . to plotlines already deeply embedded in listeners' minds, to mythic narratives whose familiar moves reveal how the world is and how people . . . act . . . . This larger meaning is crucial to the story's effectiveness as a means of persuasion, a rhetorical device.[153]

Thus a "trial needs a storyline,"[154] and a good story needs imagery and detail ("it is not enough to lay out simple facts"),[155] personal involvement ("you are not there to offer objectivity"),[156] a story arc (to "cause the story to move forward"),[157] character development,[158] and genuine drama.[159]

> The key to motivating the jury . . . is to create the story that does, indeed, involve the jury in the life of the main character. . . . [C]reate the story . . . and . . . focus the juror's

150 *See supra* note 131 and accompanying text.

151 RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 48 (1990).

152 *See, e.g.*, SAM SCHRAGER, THE TRIAL LAWYER'S ART 11 (1999) ("*Whose* account . . . deserves to be believed?").

153 *See id.* at 7; *see also* DOMINIC J. GIANNA & ALFRED S. JULIEN, OPENING STATEMENTS: WINNING IN THE BEGINNING BY WINNING THE BEGINNING § 4.3 (2d. ed. 2004) ("[T]he best stories are almost mythic in structure. Good vs. evil, strong vs. weak, men vs. nature . . . ."). Regarding mythic themes, consider Capote's motifs in *In Cold Blood* of the garden of good and evil (Garden City, Kansas), the fall of humanity as the peaceful farming community collides with evil in the form of senseless murders, and Perry Smith's exile (and his dreams of a snake). *See generally* CAPOTE, *supra* note 2.

154 WEYMAN I. LUNDQUIST, THE ART OF SHAPING THE CASE: SUCCESSFUL ADVOCACY IN AND OUT OF THE COURTROOM 129 (1999).

155 LISA L. DECARO & LEONARD MATHEO, THE LAWYER'S WINNING EDGE: EXCEPTIONAL COURTROOM PERFORMANCE 108 (2004).

156 *Id.* at 109.

157 *Id.* at 111.

158 *Id.* at 114–16.

159 *Id.* at 116–17.

> point of view from the perspective of your client . . . . Stories de-emphasize the logical and resurrect the emotion and the intuition. . . . And of course, jurors . . . are drawn to a good drama . . . .[160]

These and similar guidelines combine to suggest not simply that lawyers "win with stories," but that they win with carefully constructed stories that begin with a "hook," arouse curiosity, set the scene, develop strong characters, and present a compelling plot.[161]

Such advice puts trial lawyers in a position that is not unlike Capote's when writing *In Cold Blood*. If we assume that Capote failed in his goal to remain detached and avoid judgment, by directing sympathy toward the defendants and impliedly suggesting a miscarriage of justice, then he became an advocate and even more like a lawyer. But in shaping details and imposing structure or proportion, he seems to have failed to offer a "true account." Critics who discovered inaccuracies were not inclined to respond that Capote's account was one of several "true" accounts; they simply judged the work as a blend of fact and fiction. Perhaps that is why U.S. District Court Judge William G. Young resists the notion that a trial is a contest of stories: if an attorney says, "[opposing counsel] didn't tell . . . the other side to the story," such a statement suggests that there are two versions of reality from which the jury should choose one.[162] We should never, Judge Young explains, suggest that we are telling a story;[163] what we are offering, echoing Capote, is a "true account." And if the New Journalists are right, then we should not adopt the traditional (boring) journalist's stance, which can insulate the truth, but that of the fiction writer.[164] Hence, the advice that opening statements must be dramatic (drama, since "it appeals to emotion it permits argument to enter the minds of the jurors without . . . proof"),[165] and that lawyers should use

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160 GIANNA & JULIEN, *supra* note 153, § 4.3.

161 Jim M. Perdue, *Winning with Stories: Using the Narrative to Persuade in Trials, Speeches & Lectures*, 69 TEX. B.J. 984, (2006) (book excerpt).

162 William G. Young, Mass. Fed. Dist. Court Judge, *Young on the Practical Arts of Trial Advocacy*, *in* VA. CLE, VA. L. FOUND., 2001, at 40.

163 *Id.*

164 *See supra* note 134 and accompanying text.

165 EDWARD T. WRIGHT, WINNING COURTROOM STRATEGIES 173 (1994).

storytelling techniques such as parallel stories,[166] the creation of atmosphere, and introducing characters.[167]

In the background to all of this, Rule 3.3 of the ABA Model Rules provides that, "[a] lawyer shall not knowingly make a false statement of fact . . . to a tribunal,"[168] and Rule 3.4 prohibits alluding "to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."[169] Lawyers are expected to present a "client's case with persuasive force," and while they are "not required to present an impartial exposition of the law . . . [they] must not allow the tribunal to be misled by false statements of . . . fact."[170] Most of the trial advocacy manuals discussing effective opening and closing arguments do not refer to the above ethical requirement, and if they do, it is only to make the point that lawyers are not allowed to fabricate, exaggerate, or misstate facts.[171] It is almost too obvious to merit discussion: lawyers are not allowed to lie. Lawyers are permitted to choose, creatively, the facts that they want to reveal, but they are not allowed to change the facts as they know them.

Steven Lubet, in *Modern Trial Advocacy*, discusses storytelling and asks how much room there is for creative theory choice for lawyers who are bound to be truthful.[172] He offers the example of telling a story without mentioning the facts that could damage a client's claim or defense, but not going so far as to deny those facts.[173] More importantly, however, Lubet points out that the *known* facts in any legal dispute often support several different interpretations or stories: "Our ultimate stories might be ineffective, or even foolish, but they are ethical so long as they are not built on a false foundation."[174] Moreover, we are entitled to resolve doubts in favor of our clients, and "since seldom will the facts be undisputed or capable of but a single

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166 *Id.* at 178.

167 *Id.* at 183–84.

168 MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2002, as amended, 2003).

169 MODEL RULES OF PROF'L CONDUCT R. 3.4(e).

170 MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 2.

171 *See, e.g.*, J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS & ETHICS 159 (3d ed. 2002).

172 *See* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 4–8 (3d ed. 2004).

173 *See id.* at 5.

174 *Id.* at 7.

interpretation," there is room for conflicting stories in the courtroom, where neither attorney is "lying" about the facts.[175]

One of the most thoughtful, though ultimately inconclusive, reflections on the ethical limits of storytelling is nonlawyer Sam Schrager's *The Trial Lawyer's Art*.[176] The craft of storytelling, for Schrager, *is* the trial lawyer's art, and he rejects the notion that "trials are a rational search for truth" as a "grand oversimplification."[177] Our adversarial system "requires lawyers to show zealous allegiance to their side's version of truth," which forces lawyers "to create the *appearance* of truth."[178] Despite our "official rhetoric about truth and justice," lawyers "act as if no matter what may *actually* have happened . . . , the evidence is by its very nature inconclusive. They talk [among themselves] as if the outcome of a case may be decided more by the skill they muster than by the evidence . . . ."[179] "Lawyers shrewdly orchestrate myriad elements to make a convincing story,"[180] Schrager's ethnographic study reveals, and in a trial:

> [E]ach lawyer tries to move jurors towards his or her framing of the story by setting them up for successive revelations, moments that lead to recognitions. At these moments dispassion gives way to feeling; feeling, perhaps, to new understanding . . . . The opposing lawyers' use of . . . dramatic effects [such as emplotment] pulls the jurors in opposite directions.[181]

In terms of style, the use of parallelisms,[182] set-pieces,[183] and metaphors[184] helps "create a multilayered consistency of appearances, a complex redundancy that will withstand jurors' scrutiny so that wherever they turn, they will find confirmations of soundness to earn their trust."[185]

But what about the potential of deceiving juries?

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175 *Id.* at 2.

176 *See generally* SCHRAGER, *supra* note 152.

177 *Id.* at 5.

178 *Id.*

179 *Id.* at 5–6.

180 *Id.* at 8.

181 *Id.* at 29.

182 *See id.* at 72.

183 *See id.* at 77.

184 *See id.* at 84.

185 *Id.* at 87.

> The craft, which brings you near the truth, also exiles you from it. How do lawyers deal with this paradox? . . . [They are uneasy] about their ambiguous role in the search for justice. Could it be that the need to mislead in the service of client or cause—to create appearances along that slippery slope that runs from shading to distortion to lies—disturbs them?[186]

Schrager, intent on neither skewering nor apologizing for the lawyer's craft, finds "the supreme irony for trial lawyers" to be that "[t]hey must play their role to the hilt—even at their soul's peril."[187]

In the concluding chapter of his study, Schrager justifies the lawyer's art as arising from our commitment "to trial by jury."[188] The self-limitations on storytelling may be pragmatic (integrity helps one to be more persuasive), a matter of personal conscience (though "self-examination is constrained by the demands of practice"), or simply shaped by professional socialization.[189] And there are *moral* reasons to engage in extreme advocacy, such as the belief in equality and that justice has the best chance with evenly matched lawyers.[190]

> Maybe you pull out the stops because the other side does, or because the odds are stacked against you, or because . . . you leave nothing to chance. You're driven to do it. If you get squeamish, if ethical doubts cause you to hesitate, you are liable to weaken your performance in the heat of battle.[191]

Schrager, seeing so much good in adversarial lawyers and the jury system, withholds judgment—he's not dealing with the "official view" of the lawyer's role or "those concerned about lawyers' ethics."[192] And after all, are lawyers "less moral than journalists," who criticize trial lawyers who are "easy targets?"[193] "It would be better for journalists to look self-critically at how well *they* . . . live up to *their* public trust to investigate and report

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[186] *Id.* at 175.

[187] *Id.* at 174.

[188] *Id.* at 210.

[189] *Id.* at 212–13.

[190] *See id.* at 213–15. "Parity in representation would in time affect lawyers' conduct, tempering excessive zeal more effectively than pleas for ethical self-restraint ever will." *Id.* at 218.

[191] *Id.* at 213.

[192] *Id.*

[193] *Id.* at 221.

what they find."[194] The scandal that Schrager seems to disclose is thereby transposed onto another profession.

Returning to the perceived depths to which some overly ambitious and discredited journalists go to tell a good story, we are not always forgiving; we condemn Judith Miller, Jayson Blair, and Stephen Glass.[195] As to Capote, one might be selective in evaluating the inaccurate details that he added to *In Cold Blood* in order to round out the narrative:

> The inconsistency that bothered me most was Capote's characterization of Perry Smith . . . [as] articulate and intelligent . . . .
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> . . . .
>
> . . . Perry was not the grammar genius Capote seems to want us to believe he was. . . .
>
> Before [realizing this,] I felt sorry for Perry . . . .
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> . . . .
>
> I do not really care about some things that Capote fabricated; for example, the last scene in the book, the meeting in the cemetery between the detective Dewey and Nancy's best friend Sue Kidwell.[196]

But we would likely care if a lawyer fabricated some things to help the structure of a client's story. Even if such a fabrication was more justified than a journalist's (who holds the public trust), on the basis of an adversarial system of justice and a moral commitment to trial by jury, our professional regulations draw the line at known falsehoods. All of the shaping, artistry, structure, order, coherence, style, and other techniques of fiction must, from the perspective of our formal ethical system, defer to that standard. When Schrager talks about the "uncertainties about where, when, how, and why to draw the line—qualms that have to be repressed for effective performance"[197]—he is expressing doubts about whether the formal rules of legal ethics should not, perhaps, give way to deeper moral commitments to fairness and equality. And while he would not likely claim that aesthetic structure or style is a goal in itself, he links the moral aspects or our legal system to the craft of storytelling, that is, to the lawyer's art.

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194 *Id.*

195 *See generally* Klein, *supra* note 7.

196 Spurrill, *supra* note 134.

197 SCHRAGER, *supra* note 152, at 175.

Capote claimed no moral or message for *In Cold Blood*, except that he vowed to tell the truth. In Schrager's perspective, the lawyer's vow is to tell a good story, with a clear message that his or her client should win. Neither model fits the rules of professional conduct, which takes more seriously than either Capote or Schrager the commitment to avoid fabrication, but otherwise acknowledges the advocate's duty to tell a compelling story.

CONCLUSION

> The drama comes, if you will, from the events themselves. Don't dramatize . . . .
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> . . . .
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> . . . [T]his isn't a story; this is all reality. . . .
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> As a trial lawyer, you want to convey by every statement . . . there's only one version—strike that. "Version" is even wrong—there's only one truth, and you're telling the truth, not the other side [of the story] . . . .[198]

> The task, from a craft perspective, is, in a strict sense of the word, fictive: an elaborate fabrication of meaning for an audience. Thus lawyers' work is allied with that of novelists, actors, directors . . . all fabulists . . . .[199]

The differences in such aphorisms might be explained away by their sources: the first quote by a federal trial judge, the second by an ethnographer (of the subculture of trial lawyers) who is not a lawyer. The first is perhaps overly idealistic, the second perhaps too realistic. But the tension is familiar, as in the ethical duties to be both a zealous advocate and an honest officer of the court. One has to find a way to be, and a way to talk about how to be, both; otherwise the "lawyer's craft" becomes a dirty little secret that is only revealed by ethnographers.

Lawyers, as advocates, rely on client narratives, resolve doubts in favor of their client, identify with their clients, and develop a theory of the case that drives their production of a coherent story. But as they manipulate facts, characterize and personalize their clients, add dramatic elements, advance a plot, and structure their narrative for effect, they are doing exactly what Capote did in *In Cold Blood*, and therefore, face the same temptations (to fictionalize) that he did. The ethical goal for

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[198] Young, *supra* note 162, at 39–40.

[199] SCHRAGER, *supra* note 152, at 10.

lawyers is to avoid, during the storytelling process, crossing the line into fiction.

To the extent that lawyers are storytellers, *In Cold Blood* is perhaps a warning about the limits of drama, emplotment, and identification with one's client. Moreover, whether fact or fiction, the representation of lawyers in *In Cold Blood* provides points of reflection on the role of prosecutors and defense counsel in criminal trials. The way in which the prosecution dealt with the insanity defense, and the questions about the competence of that defense, and conflicts of interest affecting the defense attorneys provide heuristic images of ethical misconduct for law students and lawyers. Thus, the year of Capote was a good one for law and literature studies and for the legal profession's perennial need to reaffirm the ethical aspects of advocacy.