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## Hemphill: Nothing but the truth?

By Alan Hemphill

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If I was a prosecutor, I would make the following opening statement at the start of my next capital case (I am told that is statement may not be made under the "Canons of Ethics (sic)" of the Bar):

"Ladies and gentlemen of the jury, we are about to embark on a Kabuki Dance that has no relationship to a search for justice, or even a search for the truth. I am going to try to convince you to sentence the defendant to death for a vicious murder. The defense attorney is going to try to convince you that the defendant is as innocent as the driven snow.

"What you need to know is that you can't trust either of us, or the judge. Let me give you a 'for instance' or two:

"It is possible that the defense team and I were negotiating for weeks in a plea bargain wherein the defendant offered to tell us where the body of the 7 year-old rape and murder victim was hidden. Obviously, if the defendant knew that, he was complicit in the rape and murder. But the defense won't tell you that. I can't tell you that. The judge cannot tell you that. Obviously, if you knew of the defendant's offer, there is no way in hell you could find the him innocent of all charges. If it was true that he knew, and was willing to tell us if we dropped the death penalty, and I am not saying it is true but in cases like this if it was true, no one can tell you. I am forbidden by the Canon of Ethics to tell you.

"Let me give you another example. If the defense attorney and the prosecution were engaged in negotiations wherein the prosecution offered to drop four charges if the defendant agreed to plead guilty to one count and take a jail sentence of 30 years, but the defendant refused to plead guilty unless he received 20 years and his selection of where the sentence could be served, you will hear nothing of this from the defense attorney or from me. We are forbidden from even alluding to any such negotiation. The defendant and I both know he is guilty, and we can't tell you. The defense attorney will lie and tell you the defendant is innocent, but it is a lie because he knows to a certainty his client is guilty.

"To be fair, do not assume anything from my remarks. Witnesses may be sworn to give, 'The truth, the whole truth, and nothing but the truth.' That does not apply to me, or the defendant's attorney, or the judge. We can, and we will withhold information from you.

"We have roles to play, and you will not get the whole truth from either of us. It will be your duty to divine the truth from two liars, a task you have agreed to perform as a civic duty to the community.

"Good luck. Now as to this case, we will show..."

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