

Has the Law Made Liars of Us All?

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Q: How can you tell when a lawyer is lying?

A: Easy. See if his lips are moving.

(Old lawyer joke - Source unknown)

The premise of this article is that (a) the law, both substantive and procedural often demonstrates little regard for the truth, (b) the legal profession has largely ceased to hold truth and honesty as core values, as demonstrated by the Model Rules of Professional Conduct as well as by professional practices, (c) over the past two decades, the law, lawyers and the courts have been highly publicized by the media thus exposing society to these shortcomings, and (d) the result has been that society has come to blur the difference between honesty and legality and this may have contributed to the many corporate fiascos of recent years involving companies such as Enron, Imclone, Global Crossing, etc., etc. This article will examine various aspects of criminal and civil law, rules of evidence, cases involving the lawyer-client relationship and the Model Rules of Professional Conduct, to demonstrate the initial premise and will conclude with a discussion of possible corrections or improvements. The article is written with no illusions that it will be well received, but with the realization that many, perhaps most, will condemn its premises as mere moralizing and will dismiss the conclusions and suggestions as naive. In fact, one noteworthy commentator would summarily reject the premise, having made the following

rather startling assertion: “Good lawyers sometimes lie. I said, ‘a lawyer who says he never lies is either not a good lawyer or is lying.’” [FN 1]

In their insightful little book, The Moral Compass of the American Lawyer, [FN2] Richard Zitrin and Carol M. Langford present an illustration of litigation involving a lowly paid nurse’s aide who was fired from the health care facility where she had worked because she had expressed her concern to her employer about improper and poor cleanliness practices in the facility. [FN3] When she brought an action for improper discharge, the attorney associate at the large firm which represented the health care facility devised a “clever” procedural defense. She scheduled a discovery deposition of the plaintiff at one of the firm’s outlying offices which would require the plaintiff, unemployed and without resources, to take a train to the city center and then one bus and a transfer to another bus to reach the outlying location, a time-consuming and costly trip. (When, in fact, the associate’s own office was conveniently located at the city center, accessible by a short train trip for the plaintiff.) Although the plaintiff pleaded by telephone for a change in the location, the attorney politely refused and when the plaintiff was unable to keep the appointment, the attorney filed a motion for dismissal and the lawsuit was thwarted. The authors correctly note that most attorneys would believe the attorney in this case acted properly. They also posit that most nonlawyers would feel that something wrong had taken place. In this book, and it is certainly not an original thought, they observe that people “ask why lawyers so rarely seem to owe allegiance to the truth or basic concepts of justice.” [FN4]

Certainly since the end of World War II, if not before, lawyers have moved ever further from standards of absolute honesty and truthfulness, often justifying that movement by the

requirement of zealous representation of the client and by absolute fealty to the principle of confidentiality. The furtherance of the interests of the client are felt to justify, if not demand, the use of any legal procedural device, whether it accomplishes or thwarts one's archaic notions of "justice" and the touchstone for acceptable stretching and spinning of statements, is not "tell the truth" but rather "maintain plausible deniability" or to "avoid provable lies."

More often than not, lawyers, bar leaders and academicians dismiss the problem as simply being one of erroneous perception by a public that simply does not understand the complexities of the law and its practice, and assert that what is needed is simply a better educated populace. The National Conference of Bar Presidents, however, through the Professional Reform Initiative, does not approach the problem as one of perception, but rather as one of reality. The title of the January 2003 Edition of the Resource Book for Bar Leaders [FN5] is entitled "Re-Establishing Truthfulness, Honesty, and Integrity As Core Values of the Legal Profession in Troubled Times." It is noteworthy that, while the overall mission of the Professional Reform Initiative (PRI) is "[t]o increase public trust and confidence" the title speaks of "re-establishing" values, rather than simply restoring the public perception that such values already exist.

"In recent years, there has been considerable debate within the legal profession about what should be reckoned as the "core values" that distinguish lawyers from other professionals." [FN6] The report notes that this debate has included issues of confidentiality, independence of judgment, avoiding conflicts of interest, loyalty to clients and the prevention of unauthorized practice by non-lawyers. "Strikingly, however, virtually no claim has been made that truthfulness, honesty, and integrity qualify as core values of the legal profession... " [FN 7]

This observation is borne out in the reaction of most American law schools to the 1992 “McCrate Commission Report.” [FN 8] . At most of the schools, the typical response was to strengthen the courses dealing with the Model Rules of Professional Conduct and to have roundtable discussions about the importance of pro bono work and community involvement. At Wake Forest University Law School, incoming classes were required to read and discuss Harper Lee’s novel, “To Kill A Mockingbird.” [FN 9]. This is particularly ironic since the book concludes with the central character, Atticus Finch, colluding with the town sheriff to obstruct justice by lying about the circumstances of the death of the story’s villain. [FN 10]

Modern treatises, casebooks and other teaching materials are virtually devoid of any address of issues of character. By contrast, consider these passages from legal texts written and published at the end of the 19th century or early in the 20th:

“The ‘coached’ witness is almost always a bad one. But no advocate ought to be guided by the mere dictates of prudence in such a matter; his sole guides should be honor and integrity. The client may have a right to his talents and skill, but not to his conscience and integrity.” [FN 11]

“The true barrister will also scorn the practice of distorting the language of the testimony by his argument, or putting into the mouth of another words and sentiments he did not utter.” [FN 12]

“An advocate should not descend to the insidious art of inducing a witness to answer with one meaning and assume his reply to bear another, and thus lead

him to give evidence which, intended to be true, shall have the effect of falsehood.

Such conduct is a species of criminal trickery so nearly allied to subornation of perjury that it is difficult, from a moral point of view, to distinguish between them. [FN 13]

A review of modern treatises on trial advocacy, will yield virtually no such admonitions or discussions. For example, John Nichola Iannuzzi's "Handbook of Trial Strategies, 2nd ed." [FN 14] is a thorough and excellent treatment of strategy and technique in the conduct of litigation, but there is not one word regarding any obligations of honesty and truthfulness. A 1954 text by Elliott L. Biskind illustrates a more modern approach, alerting the reader to an ethical concern, but leaving it as a matter of "conscience:"

"To coach the witness to give the answer you want, or to suggest the answer you want by the form of your question or by your manner of asking it, is inviting trouble, quite apart from the unethical nature of such practice. There is a clear line of demarcation between searching the witness' memory by penetrating questions and letting him know in a more or less subtle manner what you want him to say. Whether you see that line, or whether you choose not to see it and cross over it, is for your own conscience to determine. The line may be thin but it is there for you to see." [FN 15]

This is not to suggest that these modern treatises are not honorable or that the authors are not honest and truthful people who expect others to be the same. It simply illustrates that such qualities as truthfulness and integrity are no longer a "core value" of modern legal writing, nor do

such values occupy a position of high consciousness in modern legal thought.

This degradation or abandonment of principle is bad enough for the legal profession, but now it seems to have infected all of American society. Beginning with Watergate in the early seventies, television began to provide society with more and more opportunities to see the law, lawyers and the institutions of the law in operation. Up until that time, America's most common experience with courtrooms had been the Perry Mason television series. Mason, played by Raymond Burr, was more brilliant detective than legal strategist and justice always prevailed by honest perseverance and nothing more. [FN 16] Then came the sensational 1995 trial of Orenthal James Simpson for the murder of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman. For weeks, live television brought to America every public detail of a trial that involved excruciatingly complex evidentiary inquiries, convoluted procedural challenges and endless tactical strategies. When California trial Judge Lance Ito announced the not-guilty verdict at 10:00 A.M. (PST) on October 3, 1995, 91% of all people watching television were watching him, and the majority of them were convinced that "winning" had nothing to do with truth, but more to do with how skillfully one played the game.

Shortly after O. J. Simpson was set free so that he could begin the pursuit of the "real killers" (a pursuit which will apparently be successful only if they are hiding on a golf course in Florida) the American public was given another long and public legal soap opera known as "Whitewater." [FN 17] During the Watergate hearings [FN 18] twenty five years earlier, society repeatedly saw the politically powerful seeking to avoid responsibility by a present lack of recollection, or by "taking the fifth" when assertions of the inability to recall details would not be believable. In the course of the Whitewater investigation of alleged misconduct by President

Bill Clinton and his wife, Hillary Rodham Clinton, a former member of a prominent Little Rock, Arkansas law firm, we saw another, somewhat different, form of legal “fine tuning” whereby statements which were technically true were used to create a mistaken belief in the hearer and to thus cover and hide the real truth. We also saw, on a wider scale than ever before, the use of semantic distortion. President Clinton, in depositions regarding his alleged affairs or encounters with several different women, hedged his responses by questioning the meaning of the words “alone” and even “is.” [FN 19] One of his most famous assertions of innocence involved the meaning of the phrase “have sexual relations.” In every case he was apparently attempting to avoid telling the truth without telling “a lie”, as though this would be an acceptable and honorable result. A similar and related tactic was used by a lawyer from the Little Rock, Arkansas Rose Law Firm, where Mrs. Clinton had been an attorney dealing with the Whitewater developers. At some point in preparing to respond to allegations of wrongdoing, he, or someone else in his firm, had written the notation “Vacuum [certain Whitewater related] files.” When the memo notation was discovered by investigators and questioned, the lawyer asserted that the word was being used as a noun, that there was a “vacuum”, i.e. nothing, in the files, rather than as a verb (meaning an instruction to “clean out” the files.). In a casual discussion of the matter in the faculty lounge, this author expressed his incredulity that an attorney in a major law firm and an officer of the court would make such an obviously false assertion in an official proceedings (rather than relying on the then in vogue response of “no present recollection” of the meaning of the notation.) The comment made was that while he might escape any legal consequence since it would be difficult to prove that he had committed perjury, his reputation for honesty would surely be sullied. But a colleague, a person of impressive intellect and unquestionable personal

integrity, insisted that the statement had to be accepted as true, unless it could be proven to be false. Essentially, the position of this learned person was that anything which cannot be proven to be false is, in fact, the truth. Since the Whitewater attorney's statement could not likely be disputed, as his own interpretation of the meaning of the notation, then the attorney was necessarily telling the "truth." So, it would appear, at least in the professor's mind, anything which does not constitute "perjury" is "truth" and thus, there is no such thing as simply lying. That casual conversation planted the seed for this article. Is it possible that there is no longer any distinction between "perjury" and "lying" and between "criminal" and "wrong" in our society? Has honesty, as a value of societal behaviour been replaced with legality? Is that why the Publisher's Clearing House deems it proper to send out advertisements that say "You have definitely won \$5,000,000" with the rather significant qualification "if your numbers match the winning numbers" hidden deeply in the accompanying fine print, or major banks send letters addressed, even to infants, informing them that they have been "Pre-approved" for loans or credit cards, when, of course, they have not been approved at all, but it is simply a "come-on" to get them to apply for such loans or credit cards? Is it acceptable in social and commercial discourse, as well as in a judicial proceeding, to mislead, to deceive, to lie, as long as it isn't perjury?

Today, much of society, having witnessed on television the machinations of highly publicized police investigations, pre-trial proceedings, trials, both civil and criminal, and congressional hearings, as well as the endless "talking-head-legal-consultant" shows, not to mention Judge Judy, Judge J. Brown, Texas Justice , Judge Hatchett, .People's Court, Divorce Court and the 24 hour Court TV cable channel, seems to have accepted such "sharp practices" as

the norm and adopted such behaviour in all of our social and business intercourse. As American society has gained more intimate, though often inaccurate, knowledge of the law, lawyers and the legal system, more and more people would probably react to the attorney who artfully defeated the claim of the wrongfully discharged nurse's aide with grudging admiration of the attorney for "playing the game" so well. Has society discarded honesty and fairness as the benchmarks of behaviour in favor of "winning" what seems to have become a contest, with only bare technical rules rather than any sort of moral compass? Certainly there are citizens who still cling to the notion that it is wrong to seek advantage over another by artifice or trickery, but many seem to have long since succumbed to a cynicism that all of life, certainly business life, is like a lawsuit or a negotiation and that one's conduct is not important, only the outcome. It is no longer important to be right, only to win. Cleverly avoiding, evading, distorting and "spinning" the truth has become acceptable. So, here at the beginning of a new century, we have a legal system, including its practitioners, which arguably has discarded truthfulness and honesty as core values and, through public exposure has arguably infected all of society.[FN 20] There is certainly evidence of an infectious malady of some sort in the corporate community in this country when one looks at the absolute legal and financial chaos of the past decade:

Enron: \$80 Billion in market value evaporated into bankruptcy; 4,500 jobs lost .

Global Crossing: \$40 Billion in lost market value; 2,000 jobs lost.

Tyco: \$86 Billion in lost market value; 5,973 jobs lost.

WorldCom: More than \$100 Billion in lost market value; 17,000 jobs lost.[FN 21]

The list goes on to include major accounting firms, such as Arthur Anderson and major financial players such as Merrill Lynch, J.P. Morgan Chase & Co. and Citigroup. Even that

once sweetheart sweet-tooth company, Krispy Kreme Doughnuts is accused of what is called “aggressive accounting” practices in valuing its franchise operations for repurchase, and investors have seen two-thirds of the market value of their shares evaporate. In so many of the corporate and accounting scandals of the 1990's and into the first decade of the 21st century, the devices used have not been “lying” but rather a process of making “true” statements that completely obscured the truth. Pretty much the same process that goes on in the practice of law every single day..

There were cases of outright greed and simple theft such as the raiding of Tyco by Dennis Koslowski to provide him with a \$6,000 shower curtain and a \$2,000,000 birthday party for his wife, complete with toga clad attendants and a Jimmy Buffett concert. But overt thieves have been around forever and are a problem for society, not the representatives of it. The more troubling symptom in these corporate scandals is the epidemic of cleverly contrived transactions, involving numerous obviously intelligent, ambitious and seemingly honest participants. Consider just two of the transactions attending the ultimate collapse of Enron, one involving Merrill Lynch and the other involving Citigroup. Both were examples of very clever manipulation of facts and statements to create an illusion of corporate profit, while hiding the reality of corporate debt. In each case, the transactions were structured in such a way that statements made were, in fact, literally true, but the illusion created was completely false.

Merrill Lynch and the Nigerian barges. According to an SEC complaint, executives at Merrill Lynch, including investment banker Robert Furst and executives from Enron devised a plan in December, 1999, whereby Enron, faced with a shortfall in earnings, could boost its year-end profits. The first of those transactions involved three Nigerian floating energy generating

stations, or “barges” which were “sold” by Enron to a Merrill Lynch entity for \$7 million in equity and \$21 million in debt. Enron recorded the sale at a profit of \$12 million in the fourth quarter of 1999. In fact, it was understood that Enron would ensure that Merrill Lynch would be able to resell the barges within six months at a price that would generate a reasonable return on the investment to Merrill Lynch. Although quite literally a sale had occurred, the reality was that the payment made to Enron was a loan secured by the barges. The full understanding of the transactions was allegedly confirmed later in December in a telephone call between Merrill Lynch executives and Andrew Fastow, Enron's former chief financial officer. Also during December, 1999, in a joint effort to boost Enron’s fourth quarter earnings, Enron agreed to pay Merrill a \$17 million fee to enter into a "virtually offsetting" energy trades that boosted Enron's profits by about \$50 million, according to the SEC complaint. Again, literally true statements but not the “whole truth”. [FN 22]

Citigroup and Yosemite Partnership. Also in 1999, Richard Caplan, formerly a lawyer with Jones Day, but by then a rising executive at Citigroup helped Enron further with its earnings problems by the creation and funding of Yosemite partnership which then entered into transactions with Enron, common in the energy industry at the time, known as “pre-pays” or advance payment for future deliveries of oil or other energy forms. In fact, Enron assured that Yosemite would get its money back plus a reasonable return through the re-sale of the future deliveries, if necessary to Enron or an Enron entity. Here again, the fact of pre-payment was a literally true statement, and Enron reported the sale as income, but the reality was that this was a disguised loan by Citigroup to Enron.

While the executives of Merrill Lynch and of Citigroup knew that they were creating a

false illusion, and in fact that was their whole purpose, they apparently did not consider it to be lying. One email from an employee of Citigroup even boasted: "Gives some oomph to revenues...Enron gets money that gives them cash flow but does not show up as big D debt." [FN 23] In fact, so far, none of the participants from either Merrill Lynch or Citigroup have faced any criminal charges. No charges of perjury, fraud, etc. True, the companies have paid huge fines and disgorgement of profits because SEC rules have a much higher requirement of disclosure.

The distinction between the "bright line" and strict requirements of the Securities Act, and the broad grey area of "shady" but not illegal conduct that has so permeated the capital markets during the past decade is further illustrated by the case of another Enron banker, J P Morgan Chase & Co. which engaged in the same kind of "pre-pay" transactions with Enron through an off-shore financing vehicle called Mahonia Ltd. This series of transactions, designed to allow Enron to boost its earnings reports by the manipulation of futures sales, was indistinguishable from the Citigroup/Yosemite transactions. When Enron collapsed, J.P. Morgan called upon West LB, part of a syndicate of banks that had provided Mahonia with a \$165 million letter of credit, a common form of risk underwriting to insure against default on the prepays between Enron and Mahonia, to cover the losses sustained by Mahonia in the failure of Enron to deliver under the prepay contracts. WestLB refused to honor the letter of credit, alleging that the transactions were part of a "fraudulent scheme" that essentially disguised loans to the energy company by J.P. Morgan through Mahonia Ltd. J.P. Morgan sued WestLB in London's High Court of Justice in January, 2004. On August 3, 2004, Justice Jeremy Cooke ruled in favor of J.P. Morgan and Mahonia, saying that how Enron accounted for them didn't

breach U.S. accounting and securities rules, and thus did not constitute any such fraudulent scheme. He ordered the WestLB-led banking syndicate to pay up on the letter of credit, plus interest and costs.

"Enron's accounting for the prepays was not in breach of U.S. Generally Accepted Accounting Principles," he wrote in his opinion. He added that its "accounting for these transactions did not constitute a breach of U.S. securities law." [FN 24]

"The judgment could have ramifications for a class-action lawsuit in the U.S. stemming from the collapse of Enron because the court ruled that the banks accounted for the transactions properly, securities lawyers say." [FN 25]

The Enron bankers seemed to be operating under the assumption that obscuring the truth, even outright deception, were acceptable practice as long as no deliberate lies were told, and Justice Cooke apparently agreed. However, similar cases were brought in New York by insurance companies, seeking to avoid liability under the performance bonds provided regarding Enron, on the same grounds present in the WestLB case in London. The banks reached a settlement with the insurance companies. [FN 26] In October, 2003, the District Court for the Southern District of New York concluded that UniCredito Italiano, S.p.A. and Bank Polska Kasa Opieki SA could pursue their claims for fraud and civil conspiracy against Chase and CitiCorp based upon the same conduct in connection with Enron. [FN 27] So, were the various parties simply manipulating the circumstances and permissibly "spinning" the facts to create the appearance most favorable to their purposes, or were they simply lying to obtain evil ends? The English judge decided the former while the New York court has not ruled, only concluding that there is an issue to be tried. Does the law, in fact, condone such "passive" lying, deliberate

deception by the making of true, but incomplete, statements, and reserve its condemnation only for “active” lying? [FN 28.]

Actually, the substantive law, procedural rules and the codes of professional conduct are filled with examples that certainly create the appearance of condoning such practices. And this appearance that may well have infected American society. The daily public disclosure and broadcast of such examples could easily lead the untrained [and for that matter, the trained] to believe that such conduct is “perfectly legal.” And when the distinction between technical legality and societal norms of behavior have been blurred, if not in fact eliminated, we may face very real problems.

For example, the crime of perjury is most often defined by the law as: “the willful and corrupt false swearing or affirming, after an oath lawfully administered in the course of a judicial or quasi-judicial proceeding, as to some matter material to the issue or point in question. [FN 29]

One assumes that the purpose of the law against perjury is not to protect the moral character of the person giving testimony in the judicial proceedings, but rather, to protect the judicial proceedings from the introduction of misinformation that would result in the fact-finder, whether judge or jury, being diverted from finding the truth. While that may be the purpose of the law, the cases do not pursue that purpose, focusing instead, not on the result of the testimony, but the inherent character of the testimony. In other words, true statements, even though made with the purpose of deceiving the fact-finder as to the true facts, do not constitute perjury.

U.S. v. Eddy [FN 30] is a perfect example of this distinction between merely punishing untrue statements and actually protecting the proceedings from the injection of misinformation.

Eddy was indicted in 1982 under 18 U.S.C. § 1014 [FN 31] for knowingly making a

false report or statement for the purpose of influencing the action of a federally insured bank. He was acquitted by a jury of that charge but was then indicted and convicted on two counts of perjury. In connection with testimony while being cross-examined during an in camera hearing in the earlier criminal case. The statements which were the basis of the perjury indictment were made in a hearing in chambers where the United States sought to prove that Eddy had used an Ohio State University College of Medicine diploma and an Ohio State University college transcript in efforts to enlist as a physician in the United States Navy. Count I of the indictment for perjury was based upon the following dialogue.

PROSECUTOR: Are you the same Terrance Alan Eddy that on or about March 20, 1981, contacted the Navy Medical Programs Recruiter for the Navy Recruiting District of Jacksonville, Florida?

EDDY: Yes, sir. PROSECUTOR: Claiming to be a doctor graduated from the Ohio State University School of Medicine?

EDDY: No, sir.

PROSECUTOR: And expressing a desire to join the Navy as a doctor?

EDDY: No, sir.

PROSECUTOR: And as proof or as part of your personal history submitted a diploma from the Ohio State University College of Medicine?

EDDY: No, sir.

PROSECUTOR: And official college transcript?

EDDY: No.

EDDY: I would guess so, yes, sir.

.....

PROSECUTOR: In that case, I would ask you the question again. Are you the same Terrance Alan Eddy who attempted to gain staff privileges at the Putnam County Community Hospital in Palatka, Florida, and in doing so showed credentials from the Ohio State University and a certificate from the Board of Medical Examiners from the State of Florida indicating that you were licensed to practice medicine in that state? And I think we can take that to mean you represented yourself as a physician. Did you do that?

EDDY: Like I said, I don't remember going there. I don't remember doing this action. No, sir.

[FN 32]

In fact, Eddy had not received a medical degree from Ohio State University and did not have a valid certificate from the Florida Board of Medical Examiners. He had submitted fake credentials in his application to the Navy. Thus, he argued, his answer of “No” to the question of whether he had submitted “credentials” was factually true since what he did submit were invalid fakes. The court agreed and reversed his convictions. “Thus, it is undisputed that Eddy did not submit an “official” Ohio State University diploma and a genuine university transcript during his meetings with naval recruiters. Hence, Eddy’s negative responses to the prosecutor’s questions were the literal truth “in light of the meaning that he, not his interrogator, attributed to the questions and answers,”and therefore, could not support a perjury conviction.” [FN 33]

The District Court in Kentucky based its decision in Eddy in large part because of Bronston v. United States, [FN 34], in which the Court held a witness may not be convicted of “perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication.”

In June 1964, Bronston Productions, petitioned for an arrangement with creditors under Chapter XI of the Bankruptcy Act, 11 U.S.C. s 701 et seq. On June 10, 1966, a referee in bankruptcy held a s 21(a) hearing to determine, for the benefit of creditors, the extent and location of the company's assets.

In the course of that hearing, Samuel Bronston gave the following answers as a witness in answer to questions posed by a lawyer representing the creditors:

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

'A. No, sir.

'Q. Have you ever?

'A. The company had an account there for about six months, in Zurich.

'Q. Have you any nominees who have bank accounts in Swiss banks?

'A. No, sir.

'Q. Have you ever?

'A. No, sir.'

In fact, for a period of five years, between October 1959 and June 1964, Bronston had a personal bank account at the International Credit Bank in Geneva, Switzerland, into which he made deposits and upon which he drew checks totaling more than \$180,000.

There was no dispute that Bronston's answers were literally truthful: (a) He did not at the time of questioning have a Swiss bank account. (b) Bronston Productions, Inc., did have the account in Zurich described. (c) Neither at the time of questioning nor before did he have nominees who had Swiss accounts.

The prosecution theory was that, in order to mislead his questioner, petitioner answered

the second question with literal truthfulness but unresponsively addressed his answer to the company's assets and not to his own--thereby implying that he had no personal Swiss bank account at the relevant time.

The Court concluded that as long as the statements made were true, even though they were not responsive to the question posed and even if made with the intent to mislead the statements could not be the basis for a perjury conviction under 18. U.S.C.A 1621.

So, is it “legal” to deliberately give misleading and deceptive testimony in a judicial proceeding? Clearly yes.[FN 35]

Similarly, the making of literally true statements, even though made with a conscious intent to evade truthful answer to the questions posed in connection with statements made to agencies of the U.S. Government will not serve as the basis for conviction of violations of 18 U.S.C.A. s.1001 [FN 36] In United States v. Good [FN 37] the defendant stated, on her application for an airport security badge, that she had not been convicted of “theft, fraud, dishonesty, or misrepresentation.” She had, in fact, been convicted in Virginia of embezzlement. The court concluded that, since the question did mention embezzlement, her actions did not constitute the making of a “false, fictitious, and fraudulent statement and representation” under s. 1001. Similarly, in U.S. v. Baer [FN 38] defendant was applying for an airport security badge and the application contained this question: "During the previous ten years, have you ever been convicted or found not guilty by reason of insanity of (20) Unlawful possession, use, sale, distribution, or manufacture of an explosive or weapon; ..." The defendant answered the question in the negative. In fact, the defendant was charged in 1992 with “ brandishing a firearm”, a misdemeanor offense, in violation of Virginia Code § 18.2-282, to which the defendant pled

guilty and received a sentence of probation. The court concluded that, since the question answered related to “possession, use, sale, distribution, or manufacture” and not to “brandishing”, the answer did not constitute a violation of Sec. 1001. In both cases, as in others, it was apparent that the purpose of the question, particularly in light of heightened concerns for airport security in the wake of 9/11, was to reveal offenses that might bear on the important issues of safety and security. Nonetheless, the intent to mislead and to hide that information was not actionable under the applicable statute.

The traditional civil remedy for deception, common law fraud, required: a material misrepresentation; that was false; that was known to be false when made; or was made recklessly as a positive assertion without knowledge of its truth; that was intended to be acted upon; that was relied upon; and that caused injury. [FN 39]

Is recovery allowed or relief granted in fraud cases because of the making of the statements that resulted in the fraud or is it because of the effect of the fraud, i.e. that the injured party is put under a misapprehension of the true facts to his or her detriment? While many acts of overt deception, which the criminal law does not condemn, may also evade civil liability, the cases are not as quick to excuse truthful, but misleading statements. If there is a confidential relationship between the parties, then it is generally agreed that to avoid a charge of fraud, there must be not only truthful statements, but there must be full disclosure. Similarly, where one has made a statement which was true or believed to be true at the time, if the maker of the statement acquires knowledge that the statement is untrue, or that circumstances have changed so that the statement does not remain true, there may be an obligation to correct the understanding of the party to whom the statement was made. [FN 40] And if literally true statements are made, but

thereby create a mistaken understanding by the party to whom the statement is made, then the party making the statement may be required to correct the misunderstanding. [FN 41] Where, however, no statement is made, in the absence of some affirmative obligation to make a statement, the fact that a party is misled by silence generally does not constitute fraud. [FN 42] If the law, as it does in so many cases, requires sufficient disclosure to reveal the truth of the matter, and thereby, presumably, accepts that such disclosure is not an unreasonable burden, one wonders why the law does not always seek such a laudable result? If one is misled and deceived, what difference should it make whether it is because of untrue statements, true statements or no statements at all? If the avoiding of the deception can be accomplished by a burden placed on the other party that is not unreasonable, then why should that burden not always be there?

Libel and Defamation

The common law condemned lying as a social ill and provided a remedy when the lies were injurious of reputation. If one made defamatory statements about another, truth was a defense, but defamatory statements were presumed to be false and the burden was on the person making the statements to justify the resulting injury by proving the truth of the statement. But modern decisions have eroded the principles of libel and slander to the point that the exceptions to the rule far outweigh the rule itself. Either for reasons of deemed necessity for the “proper and efficient administration of justice” or because it is thought that such statements are protected by the First Amendment to the United States Constitution, today’s law, in a variety of circumstances, grants us the privilege to lie with impunity about another person to their detriment.

It is generally held that “a defamatory statement made in due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice.” [FN 43] . The public policy underlying this privilege “is grounded upon the proper and efficient administration of justice. Participants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits.”[FN 44] In deciding whether a statement is absolutely privileged, a court must determine (1) whether the statement was made in the course of a judicial proceeding; and (2) whether it was sufficiently relevant to that proceeding. [FN 45] These issues are questions of law to be decided by the court. [FN 46] It is noteworthy that, in none of the examinations of this issue, is the truthfulness of the defamatory statements raised. Thus, not only may one make defamatory statements with actual malice, the statements need not be true. While it may be necessary to protect one who must, in the course of giving testimony, utter defaming remarks about someone, it is difficult see how extending that protection to untruthful statements is an aid to the “proper and efficient administration of justice.” [FN47]

Under the decisions of our Supreme Court, we may, with very little risk, utter and publish lies about our public officials. Judges of the various courts must endure the public criticism of those who may be disaffected by their decisions, and may not punish by criminal contempt those who level that criticism [FN 48] This is true even though the utterances contain “half-truths” and “misinformation.” [FN 49] In New York Times v. Sullivan [FN 50] the Court extended this rule to cover public criticism of all public officials, and protecting the critic from civil liability as well. The Court deemed it necessary to afford us the constitutional guarantee of free speech under the First Amendment. “The constitutional guarantees require, we think, a federal rule that

prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” While the announced rule does provide an exception for false statements, the exception is so restrictive that there are virtually no cases where a public official has been allowed recovery of damages for lies circulated about his or her performance or conduct. Very shortly after *New York Times* was decided, the Court revisited the question of defamation and civil liability in a case involving Wally Butts, the Athletic Director of the University of Georgia [FN 51] The *Saturday Evening Post* had published an article accusing Butts of having telephoned Paul “Bear” Bryant, the head coach of the football team at the University of Alabama, in 1962, to give him information regarding plays and strategies to be used by the Georgia team in the upcoming Southeastern Conference football game between the two schools. [As an interesting aside, the Court noted that Butts was not employed by the University of Georgia, a state institution, but by the Georgia Athletic Association, a private corporation. Thus, concluded the Court, he was not a “public official” as he presumably would have been if employed by the university. Apparently, the public policy interest and constitutional address of our right to question and criticize the character and conduct of our elected officials, our legislators, executives and the persons who control the administration of our courts is equally concerned with preserving our right to condemn and slander the decision made on a crisp Fall Saturday afternoon to run an off-tackle slant when facing third down and long yardage.] Butts sued the publisher of the magazine and was awarded compensatory and punitive damages. The Supreme Court determined that, while Butts was not a public official, he was a “public figure” and thus the public had a compelling

interest in knowing information regarding his conduct similar to the public interest in information regarding public officials. The Court concluded that constitutional considerations similar to those present in *New York Times* precluded leaving the issue of damages for defamation of a public figure to state libel laws. Justice Harlan wrote the majority opinion that a public figure could recover damages for a defamatory falsehood only where the substance demonstrated apparent substantial danger to reputation and then only upon a showing of highly unreasonable conduct constituting extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. Justices Black and Douglass concurred in result, but insisted the First Amendment should preclude the media from liability in all cases, presumably including deliberate falsehoods. Chief Justice Warren concurred in result but saw no reason to carve out a distinct and separate rule but would simply extend the rule of *New York Times* to include both public officials and public figures. Subsequent cases have done just that current law makes no distinction between the two. [FN 52]

While it is certainly true that there is a strong public interest in transparency of government, free flow of information and full and open debate of issues and ideas, the broad definition of “public officials” to include a grade school wrestling coach [FN 53] and the absence of any definition by the Court of the term “public figure” [FN 54] has virtually eviscerated the common law threat of punishment or liability for defamation. Certainly in the case of newspapers, television, etc., the mere fact that one has drawn the attention of such outlets would seem to make one, axiomatically, a public figure. While the Supreme Court has not yet adopted the radical position urged by Justices Black and Douglass in the *Butts* case, that media should enjoy absolute immunity from libel actions, the Court did, in 1986, determine that the media

should not be subject to the common law rules of defamation. In Philadelphia Newspapers, Inc. v. Hepps, [FN 55] the Court held that even in the case of a private figure, one who did not meet either the definition of public official or public figure, if the defamatory statement was in regard to a matter of “public concern” then the constitutional interests were such that the common law presumption that any defamatory statement was false would be set aside and the burden would be placed upon the aggrieved party to prove that the statement was false in order for damages to be awarded. Here again, the term “public concern” is not defined by the Court and it would seem to include anything that the media determined newsworthy enough to make comment in the first place.

While England does not have a written constitution, it seems to have a vibrant democracy and certainly an active press, and yet it seems to have managed to preserve both the right to criticize government and to have an open debate of ideas without sacrificing due regard for truth and honesty. Perhaps one of the most dramatic illustrations of the difference between English law and our own was an incident during Margaret Thatcher’s campaign for a third term as Prime Minister of England. Her principal opponent was Neal Kinnock of the Labour Party. During the course of the heated campaign an allegation appeared in the newspaper that Ms. Thatcher, prior to her marriage to Denis Thatcher, and while she was still a student at Oxford University, had allowed Denis to spend the night in her room. The accusation was false and Ms. Thatcher threatened a libel suit with the result that the Kinnock camp made an immediate retraction and apology. Under English law, “fair comment” is an affirmative defense under which a defendant must prove that the alleged libel was “comment” and that the “comment” was objectively “fair” or that it could honestly have been said by an honest person. Truth is also a defense, but the

English system still adheres to the common law presumption and the burden of defending if one chooses to make a defamatory statement. The English apparently feel that neither the press nor political opponents should have the privilege of lying with impunity. In this country political campaigns, particularly on the national level, have spawned a complete industry in the art of fabrication and accusation. So called “spin doctors” act without fear of any restraint or penalty. Anyone who steps into the political arena must do so with the awareness that they, and their entire family, may be attacked with the most vicious lies and the law will afford them no practical protection whatever.

As this article is being finalized, the country is embroiled in hotly contested presidential campaign between the incumbent, republican George W. Bush and the democratic nominee, Senator John Kerry of Massachusetts. One of the bitterest and most divisive issues in the campaign is the military record of Senator Kerry who received several decorations for his service in Vietnam. [FN 56] The validity of his record of service and of his combat decorations is disputed by a privately funded political action group by the name of “Swift Boat Veterans for Truth.” This group claims and publicly charges that Senator Kerry’s record is false and that he did not deserve the decorations. If these charges are true, it is important that voters know it. If the charges are not true then Senator Kerry has been most unjustly maligned. In England, Senator Kerry, assuming the charges are untrue, would have already filed a libel action against this group and we would all find out that the charges are untrue. In this country, our rules regarding libel of public officials and political candidates are such that no such action will be filed and, regardless of the outcome of the election, the issue will never be truly put to rest. The political camp that loses the election will always feel either that a good and honest war hero was

defeated by lies or that a fraudulent war hero occupies the White House. It is difficult to see how that outcome is desirable. It would be far better if the courts could bring resolution.

Rules of Procedure.

The rules of civil procedure are ostensibly designed to provide for efficient administration of justice and to insure the validity, relevance and authenticity of evidence submitted in a civil case, and the rules of criminal procedure seek the same result for criminal proceedings with the added concern of protection of the rights of the accused. One would think that with that being the stated purpose, insuring that the “truth” be revealed in all proceedings would be among the highest priorities. Actually, if that is so, it takes a well trained eye to see that priority in many of the rules.

Exclusionary rule

Certainly the rule most maligned and misunderstood by the lay public, and for that matter by many members of the legal profession, is the Exclusionary Rule under which highly probative, even unquestionably accurate evidence, particularly confessions, are excluded because of violations of the strictures of the Fourth, Fifth or Sixth Amendments. [FN 57] Under this rule the truth is of no consequence. If the evidence is found by the court to have been obtained in violation of the constitutional mandates, no matter how technical the violation, then out it goes and often the factually guilty go free.

Parol Evidence Rule.

In contract law, as well as in the laws of conveyances, a particular fact may be unquestionably true and there may be numerous ways to prove it, but the parol evidence rule will often preclude the presentation of such proof or even asserting the existence of the fact. Not

because it is not truthful assertion, but because the rule prohibits the assertion without regard to the truth. The rule has a long history and certainly has a basis in legal reasoning, but to the general public, seeing it in operation, it appears to have little or no regard for the truth. The same is true of the Statute of Frauds. There may be evidence, of unimpeachable quality, that an agreement was entered into, a promise was made, or a conveyance was intended, but the truth of the matter is totally irrelevant if the Statute of Frauds [FN 58] demands a writing. Once again, the rule is ancient and has a solid foundation in legal reasoning ,, but it can hardly be said to be, in any way, subservient to the truth.

The Statute of Wills.

How many families have been torn apart by disputes over the disposition of the assets of a parent or other close relative? Under the Statute of Wills [FN 59], truth is simply of no significance. It does not matter what quantum of proof, indeed that proof is indisputable or for that matter that it is not disputed at all. An intended arrangement, even a promised arrangement will be set aside if the technical rules of the statute of wills are not complied with. Disappointed relations have not just felt betrayed by the law and disillusioned by it's disregard for the truth, they have killed over it. [FN 60]

The Rules of Professional Conduct.

Many of the rules by the which the legal profession is governed create an illusion of dishonesty in the eyes of general society. Certainly the obligation to provide representation to all, including those who are guilty of the most heinous crimes, will often lead the general public to identify the attorney with the accused and the proficient representation of such a person is equated with "trying to get them off." This reaction, to the legitimate responsible legal

representation of any accused, is regrettable but probably unavoidable. To be sure, there are times when counsel for the accused will, in fact, identify with a guilty client and seek to assist them in escaping justice by means that are unscrupulous. On such an occasion, it is not the rules that are at fault, but rather the misconduct of the attorney.

However, some of these rules allow, or perhaps even require, conduct that, despite hortatory exclamations of a high moral standard, ring hollow and empty when examined in light of their true meaning and of actual practice.

Confidentiality.

The rules of client confidentiality were thoroughly debated in connection with the replacement of the “Code of Professional Responsibility” [FN 61] by the “Model Rules” [FN 62]

Under the CPR, a lawyer could breach the confidentiality rules to reveal the intention of a client to commit “a crime” and the information necessary to prevent the crime. [FN 63] In part, the examination of the rules regarding confidentiality was prompted by financial losses incurred by persons or institutions which losses might have been avoided by the disclosure of information by attorneys for the actor which caused the loss. The most notorious case involved the O.P.M. Leasing Company, Inc. (OPM) which defrauded lenders out of millions of dollars by faking equipment leases. The New York law firm of Singer, Hutner, Levine and Seeman represented the company in the lease-finance transactions from 1971 to 1980 and had to pay millions in damages because it was aware of the practices of the company and did not disclose the facts to lenders. [FN 64] The debate of the ABA House of Delegates opened in February, 1983 with the proposal that the rule allowing disclosure of intent to commit a crime and of the information

necessary to prevent a crime be expanded to include the prevention of financial loss and the remedying of losses already caused. In the end, however, rather than an expansion of the authority to disclose confidences, the exception was narrowed from the prevention of “a crime” to the prevention of “a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm...” [FN 65] The result of that debate was, and remains controversial and not all states have adopted the more narrow rule, instead retaining the original “crime prevention” disclosure rule of CPR 4-101 [FN 66] and some have adopted the broader rule that was initially proposed. [FN 67]

Here again, there is a difficult question of balancing what is perceived as a very necessary sanctity, the guarantee of the privacy of any conversation between person and their attorney, with the interests of society in having certain information made available to those whose lives and/or fortunes may be adversely affected by the information or the lack of it. It is often difficult for the general public to recognize the difference between protecting a client’s confidences and “aiding and abetting” the client. The case of attorney Francis R. Belge of Syracuse, New York is an extreme example. In 1973 Belge and another attorney were appointed as counsel for Robert F. Garrow, Jr., who was charged with the crime of murder. In the course of his interviews with his attorneys, Garrow confessed to three other murders including that of a young girl named Alicia Hauck, who was known to be missing but was not yet known to the authorities or to her parents to have been the victim of a homicide. Based upon the information provided by the client, Belge, with the assistance of a friend, discovered Alicia’s body hidden in a remote spot in the Oakwood Cemetery in Syracuse in September, 1973. Belge did not disturb the body nor did he report its existence or location to anyone. In June, 1974, after his client was found to be

insane and thus immune from prosecution for the murder, Belge revealed the fact of Alicia Hauck's death and the location of the body. The public reaction was predictable. That the attorney would allow Hauck's parents to continue to hold out hope, that he would allow the authorities to continue the futile search for a missing person and that he would allow the body of this young girl to remain hidden without a proper burial was more than many could accept under any theory. The District Attorney referred the matter to the Onondaga Grand Jury and Belge was indicted on the only charges anyone could come up with, violations of public health rules of the State of New York dealing with the disposition of dead bodies.

On August 1, 1975, the judge of the County Court dismissed the charges. [FN 68] After a lengthy examination of the origin and purpose of the rules of privileged communications, Judge Ormand N. Gale dismissed the indictments, concluding that "Francis R. Belge conducted himself as an officer of the Court with all the zeal at his command to protect the constitutional rights of his client." [FN 69] The dismissal was affirmed by the Appellate Division [FN 70] and by the New York Supreme Court [FN 71] Was such an affront to standards of compassion and decency really necessary? Did Belge err in favor of his client without due regard for the interests of the parents or of society? Could he have revealed the information about the body without incriminating his client? What if the authorities had suspected Garrow and had directed the question to Belge "Has your client told you anything that might help us find this girl?" Would Belge be allowed to lie to them? Would Belge be required to do so? If there was evidence at the scene of the crime that would implicate the client if discovered as a result of the disclosure of the existence and location of the body? If not, how would the client be compromised by the disclosure? If so, couldn't the evidence be excluded so that revelation of the existence and the

location of the body would meet the needs of the parents and society without a denial of the murderer's constitutional rights? Certainly it is difficult for the general public to understand the necessity of the confidentiality under the circumstances. Certainly it creates the appearance that the rules of professional conduct require the attorney to ally himself or herself with the goals of the criminal to avoid detection.

Before the Courts.

The rule of confidentiality often requires the attorney to withhold the truth. Model Rule 1.31 requires "reasonable diligence" in the representation of a client and the commentary requires "zeal" in the advocacy. Zealous advocacy may require the attorney to actively hide the truth from the fact finder. Consider a litigation attorney in either a civil or criminal case. The opposing side presents a witness whose testimony, if accepted, will be damaging to the client's interest. The attorney knows for certain that the testimony the witness has given is accurate and true in every regard. The attorney has available information that will impeach the general credibility of the witness. May the attorney impeach the witness? Most practitioners and authorities would agree that the attorney may do so [FN 72] , and under the standard of zealous representation [FN 73], must do so. When the attorney proceeds with that process whether by cross examination or by rebuttal evidence, isn't the attorney knowingly and deliberately trying to steer the fact finder away from the truth? Isn't the attorney trying to convince the fact finder that the witness's testimony is untrue, when in fact it is known to be true by the attorney. That isn't lying?

How does an the system balance the sixth amendment right to assistance of counsel, the fifth amendment right of a criminal defendant to testify and present evidence in his or her own

behalf and the obligation of an attorney, under the rules of professional responsibility, not to “..counsel or assist a witness to testify falsely...” [FN 74] The case law, commentary and various state rules of professional conduct are in total disarray. There is confused disagreement whether the issue is how to deal with a client who intends to commit perjury or one who has already done so.

In Pennsylvania in 1967, Norman Wilcox was on trial in state court on a charge of rape. His court appointed attorney refused to allow him to take the stand and testify to an alibi because she believed his testimony would be perjured. After a heated exchange, the attorney informed the court of the disagreement and stated that if the defendant insisted on testifying, she would move to withdraw as counsel. The court then informed Wilcox of this and warned him that if he chose to testify he would have to proceed without counsel. Wilcox did not take the stand and was convicted. Later, Wilcox filed for a writ of habeas corpus on grounds that the combined action of the court and the attorney had deprived him of the right to take the stand and testify in his own defense, a right afforded to him under the due process clause of the fourteenth amendment. The District Court granted the petition and the Third Circuit affirmed, concluding that the attorney’s conjecture about the client’s perjury were not grounds for the action taken. [FN 75]

A few years later the Kansas Supreme Court was faced with a similar case wherein counsel, believing the defendant intended to commit perjury, sought to withdraw and informed the trial judge of his reason for doing so. The judge required counsel to continue the representation despite the resurfacing of the issue in court when the defendant complained that he was not being fairly represented by counsel who was being forced to remain against his will. After his conviction for armed robbery, defendant appealed to the Supreme Court of Kansas and

the court affirmed the conviction concluding that (a) the duty of the attorney to the court made the motion to withdraw perfectly proper, (b) the disclosure of the attorney to the court that the client intended to commit perjury did not constitute a violation of the attorney-client confidentiality because of the exception which allows disclosure of intent to commit a crime (perjury) and (c) requiring counsel to continue to represent defendant did not deprive defendant of competent representation and thus defendant received a fair trial. [FN 76]

Just as there is disparity in the case law, there is disagreement among commentators. [FN 77]

The Supreme Court addressed the issue, but narrowly, in *Nix v. Whiteside* [FN 78] concluding that Whiteside, on trial for murder, was not deprived of his sixth amendment right to counsel when his attorney threatened to inform the court and to withdraw if Whiteside presented false testimony to concoct a claim of self-defense. The Eighth Circuit [FN 79] had concluded that the attorney's actions constituted a threat to violate the attorneys duty to preserve the confidentiality of the client's communications. Justice Burger's address to the issue is confined to a single sentence without reference: "Moreover, accepted norms require that a lawyer disclose his client's perjury and fraud upon the courts." [FN 80]. If there is such an "accepted norm" it is well hidden, particularly if the jurisdiction has adopted Model Rule 1.6 [FN81] which limits permissible disclosure to the prevention of criminal acts which are likely to result in imminent death or substantial bodily harm. Rule 3.3 of the MRPC requires "Candor Toward the Tribunal" and implies, but does not specifically authorize disclosure, whether to prevent perjury or in the case of perjury that has already occurred. The statement in the commentary that "Three resolutions of this dilemma have been proposed" is recognition that the issue is not resolved by

Rule 3.3. If Rule 3.3 does authorize disclosure of a client's confidences in order to prevent or to rectify the presentation of false evidence then it is arguably in conflict with Rule 1.6. [FN 82]

As recently as January, 2004, the Professionalism and Ethics Committee of the California Bar issued Formal Opinion 2003-01 "Client Perjury and the Criminal Defense Attorney" [FN 83] holding to the position that as long as the attorney merely "believes" a client is committing perjury, the attorney must continue to zealously represent the client, aiding the client "in a fully professional examination and potential rehabilitation after cross-examination." If the attorney has actual knowledge, by virtue of the client's admission, then the attorney must first attempt to dissuade the client. If the client insists, then the attorney may, "but is not encouraged" to seek to withdraw. "Rather, the attorney should advise the client of the risks of perjury and the narrative form of testimony before proceeding with the narrative approach." [FN 84]

In Negotiation.

Professor James J. White, in his 1980 examination and discussion of the then newly formulated provisions in the Model Rules of Professional Conduct dealing with negotiation (4.,4.2, 4.3) [FN 85] concludes that truthfulness and honesty are not reasonable expectations and are not required by the rules:

" A final complication in drafting rules about truthfulness arises out of the paradoxical nature of the negotiator's responsibility. On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are

successful negotiators and those who are not lies in this capacity both to mislead and not to be misled. Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true position. . . . To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.” [FN 86]

This quote might suggest Professor White felt there was a contradiction, or rather conflicting responsibilities, but his conclusions are quite singular. The following statement from the article is unambiguous:

“Pious and generalized assertions that the negotiator must be “honest” or that the lawyer must use “candor” are not helpful. They are at too high a level of generality and they fail to appreciate the fact that *truth and truthful behavior at one time in one set of circumstances with one set of negotiators may be untruthful in another circumstance* (emphasis added) with other negotiators.” [FN 87]

Professor White may have drawn this rather startling conclusion about the transient relativity of truth from what Professor Timothy Terrell called a strategic, almost comical, retreat by the ABA from the literal requirement in Rule 4.1 that a lawyer must not make a false statement of material fact. [FN 88] The Comment to 4.1 provides as follows: “Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.”

What the commentary really means is not that facts may or may not be material. What it

means is that certain statements should be recognized as the things about which one may legitimately lie and should be expected to do so. Rule 4.1, as it is explained by Professor White and understood and applied by most practitioners would be much more accurately written if it provided:

“A lawyer should not make a false statement unless it is in regard to the kind of thing other lawyers or other parties to the negotiation should reasonably expect the lawyer to lie about.”.

A norm that contemplates and approves of outright deception cannot avoid having a deleterious effect on the profession and further tarnishing the public perception of law and lawyering. If one is expected to lie and to do so convincingly, then when must one suddenly stop lying and be forthright? Moreover, the argument can be made that such a standard is not necessary, discriminates against the impotent and poor in favor of the wealthy and powerful and may even be counterproductive in the process of negotiation. [FN 89]

So, in so many different ways, the legal system, sometimes in balancing competing interests and other times out of unexplainable neglect or a misguided sense of necessity, either disregards or willingly sacrifices truth as a paramount value. And in today's cable-ready society it does so in public. If the law is going to be the example that society chooses to follow, then it would seem to be desirable that the law set a better example. Can anyone dispute that there is certainly room for improvement?

“Chicanery” is an archaic term that is seldom used in today's vernacular, but it is a practice that is altogether too common. The word is defined [FN 90] as “deception by artful subterfuge or sophistry; a piece of sharp practice (as in law).” If one were to propose that

“chicanery” be banned, many lawyers would agree, but if the proposal was to prohibit “sharp practice” the reaction would probably be quite different. But here is the question: “Why should we allow anything, other than neglect by the prosecuting party, which avoids or unduly delays the decision of a case or controversy on its merits?” Demanding discovery depositions merely for the sake of harassment and/or deliberately scheduling such a hearing at a time or place that will inconvenience an opponent. Answering a request for discovery with truckloads of documents, with the requested materials buried deep in the middle. There are any number of such “sharp practices” which have nothing to do with merits of a case or with the efficiency of the justice system. The Federal Rules of Civil Procedure currently impose sanctions for frivolous pleadings. [FN 91] Could not a similar rule impose sanctions upon such “sharp practices” if, upon challenge, a valid purpose apart from delay or harassment could not be shown?

Why, in the law of perjury, fraud, Section 1001 violations, etc. must the actus reus be limited to statements which are untrue, if the same harm that the law seeks to prevent or redress is brought about by true statements? What if we adopt a principle which states “Any civil cause of action, charge of unprofessional conduct or criminal charge which may be based on the making of a false statement may also be based upon the making of a true statement if such statement is proven, by the appropriate requisite burden, to have been made with the intent to deceive.” The law should concern itself with the deception rather than the nature of the statement.

In contract law we have long required fair and complete disclosure in contracts between persons who are in certain confidential or fiduciary relationships, [FN 92] and found the application and enforcement of that principle to be economically and judicially feasible. Why

limit the principle.? Would a society where fairness is the norm not be desirable? Why not extend the principle to all contracts?

Rules such as the Statute of Frauds and the Statute of Wills have ancient roots, which make them venerable, but also make them somewhat obsolete. When they were passed, the principle means of communication was by writings that were physically carried to the court sitting in London. Today's methods of communication and preservation and proof of information did not exist when the best proof of an agreement was a physical document and the most reliable proof of a deceased' testamentary desire was two disinterested witnesses. It is time for such doctrines to be reexamined in light of modern technology. A videotaped will which is determined to be seamless should be accepted as authentic. There are any number of ways to prove the existence and content of agreements, and a writing would not only be unnecessary, it would be redundant. In any situation, where a departure from the rules of evidence or from the rules of procedure is necessary to pursue the truth and will do no harm to the trustworthiness of the evidence or the efficiency of the judicial or administrative process, the importance of rules should be carefully weighed before the truth is not pursued. [FN 93]

Finally, the results in jurisdictions such as Louisiana should be closely followed to see what mischief, if any, is done to the functioning of the legal system and the administration of justice by the adoption of liberalized rules of attorney-client confidence. [FN 94] Unless some real problem is shown, the American Bar Association should reconsider the position it adopted in 1983 with the new Model Code of Professional Responsibility, and regardless of the actions of the ABA, every jurisdiction which has not already done so, should consider revising their rules accordingly.

FOOTNOTES:

1. See William H. Simon, *Virtuous Lying: a Critique of Quasi-categorical Moralism*, 12 Geo. J. Legal Ethics 433, 1999
2. Ballantine Books, New York, 1999
3. *Id.* at 1.
4. *Id.* at 3.
5. MATERIALS FOR OUTREACH TO THE JUDICIARY, DISCIPLINARY AUTHORITIES, THE LAW SCHOOL COMMUNITY, AND BAR ADMISSION AUTHORITIES, January 2003 Edition
6. *Id.* at Tab1/1
7. *Id.*
8. The ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT- AN EDUCATIONAL CONTINUUM.
9. J.B. Lippincott, Philadelphia, 1960
10. William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture* 101 Colum. L. Rev. 421, March, 2001
11. ELLIOTT'S GENERAL PRACTICE Byron K. Elliott and Willam F. Elliott, The Bowen-Merrill Company, Indianapolis and Kansas City, 1894, at sec. 10, p. 9.
12. A TREATISE ON AMERICAN ADVOCACY, by Alexander H. Robbins, Central Law Journal Company, St. Louis, 1904 , Sec. 175 at p.221
13. ESSAYS IN LEGAL ETHICS, 2ND ED. George William Warvelle, Callaghan & Co., Chicago, 1920 at p. 109
14. Prentice Hall, 2001
15. Biskind, HOW TO PREPARE A CASE FOR TRIAL, Prentice Hall, 1954, at t p. 94

16. The Perry Mason television series premiered on CBS on September 21, 1957 with “The Case of the Restless Redhead.” There were 271 episodes from 1957 to 1966. Nearly every case ended with either a tearful or enraged confession by the real culprit thus exonerating Mason’s obviously innocent client. Thus, justice always prevailed. No guilty party ever evaded punishment because of a technical violation of Miranda or because of questionable DNA results.

17. “Whitewater” refers to an investigation of an Arkansas real estate development founded in 1979 as The Whitewater Development Company in which then Governor Bill Clinton and his wife, Little Rock lawyer, Hillary Rodham Clinton, were investors. The venture was financed by Madison Guaranty Savings and Loan Association of Augusta, Georgia. In the “melt-down” of the savings and loan industry in the late 1980’s, Madison went bankrupt costing taxpayers \$60 million dollars. In 1992 the Resolution Trust Corporation, a subsidiary agency of the U.S Treasury Department set up to deal with failed S and L’s asked the Justice Department to investigate the payments made to Whitewater. The scope of this investigation broadened until it included a perusal of President Clinton’s sex life, allegations of perjury, articles of impeachment, the imprisonment of several of Clinton’s associates, the suicide of a Presidential advisor and the revocation of Clinton’s law license. The Whitewater investigation finally closed and a final report was issued on March 20, 2002, declaring that there was insufficient evidence to warrant prosecution of either Bill Clinton or Hillary Rodham Clinton on any charges. The total cost of the investigation was estimated at \$64 million dollars, not to mention the political divisiveness in the United States which has not yet subsided.

18. On June 17, 1972, a team of covert operators from the Committee to Re-elect the President (Richard Nixon) broke into the Democratic National Headquarters in the Watergate Complex in Washington, D.C. to plant listening devices. Their discovery and capture and the subsequent cover-up of White House involvement led to the resignation of President Nixon on August 9, 1974. The entire episode is typically referred to as “Watergate.”

19. Jones v. Clinton, 36F.Supp2d 1118, E.D. Ark. 1999

20. See, for example Richard K. Sherwin, WHEN LAW GOES POP, THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE”, The University of Chicago Press, Chicago and London, 2000

21. Sources: Bloomberg.com; Yahoo Finance.com. Job loss figures from CBS Market Watch

22. “SEC Accuses Merrill of Fraud In Enron Deal”, 3/18/03 Wall St. J. C1, 2003 WL-WSJ 3962110

23. 8/11/03 Bank Loan Rep., “Another Suit Filed Against Enron Bankers” 2003 WL 7846802

24. “Moving the Market: J.P. Morgan Wins WestLB Suit, A Dispute Over Enron Financing”, by Eric Portanger. 8/4/04 Wall St. J. C3, 2004 WL-WSJ 56936776

25. *Id.*
26. JPMorganChase Bank v. Liberty Mutual Ins. Co., et al, 01 Civ. 11523 (JSR)(S.D.N.Y.)
27. UniCredito Italiano, S.p.A. v. JP MorganChase Bank, No. 02 Civ 5328 (KTS)(JCF), 2003 WL 22339469 (S.D.N.Y. Oct. 14, 2003)
28. Other than the SEC, which, fortunately for us all, has not become the stuff of daytime T.V. and endless news analysis but, unfortunately for us all would teach a higher standard of candor and fair disclosure.
29. 60A Am. Jur. 2d Perjury 1
30. 737 F.2d. 564, C.A. Ky., 1984
31. § 1014. Loan and credit applications generally; renewals and discounts; crop insurance
- “Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662), or the Small Business Administration in connection with any provision of that Act, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.”

32. *See infra* note 27 at 566-567

33. *See infra* note 27 at 569

34. 409 U.S. 352 (1973)

35. “A literally true answer even though unresponsive or shrewdly calculated to evade cannot form the predicate for a perjury conviction.” *U.S. v. Sainz*, 772 F.2d. 559, C.A.9, AZ 1985; *State v. Douglas*, 349 N.W. 2d 870, Neb. 1984)

36. 18 U.S.C.A. 1001.

“(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.”

37. 326 F.3d 589 (4th Cir. Apr. 22, 2003)

38. 274 F.Supp.2d 778, E.D.Va.,2003

39. 37 Am. Jur. 2d Fraud and Deceit § 23

40. *DRR, L.L.C. v. Sears, Roebuck and Co.*, 949 F.Supp. 1132, D.Del.,1996.

41. “* * * if an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate.” *Turner v. Harvey*, 1 Jac. (Eng.) 169,, cited in *In re Dryden's Estate*, 52 N.W.2d 737 , Neb. 1952

42. *Omega Engineering, Inc. v. Eastman Kodak Co.*, 30 F.Supp.2d 226, D.Conn.,1998.

43. *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775. See also 53 C.J.S. Libel and Slander, s 104, p. 168; 33 Am.Jur., Libel and Slander, Sec. 146

44. *Houpe v. City of Statesville*, 128 N.C.App 334, 346, 497 S.E.2d 82, 90, disc.rev.denied. 348

N.C. 72, 505 S.E.2d 871 (1998)

45. Harris v. NCNB Nat'l Bank of N.C., 85 N.C.App 669, 672, 355 S.E.2d 838, 841 (1987)

46. Scott v. Statesville Plywood & Veneer Co., 2040 N.C. 73, 76, 81 S.E.2d 146, 149 (1954)

47. *See infra* note 42

48. Bridges v. California, 314 U.S. 252 (1941)

49. Pennekamp v. Florida, 328 U.S. 331 (1946)

50. 376 U.S. 254 (1964)

51. Curtis Publishing Company v. Butts, 383 U.S. 130 (1967)

52. Restatement 2d Torts, s. 580A

53. Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okl.1978)

54. Black's Law Dictionary (8th ed. 2004) defines "Public figure" as: " A person who has achieved fame or notoriety or who has voluntarily become involved in a public controversy."

55. 475 U.S. 767 (1986)

56. Sen. Kerry, then Ltjg. John Kerry, USNR , served as commander of river patrol craft, known as "swift boats" on the Mekong River in South Vietnam from November, 1968 to April, 1969. During that time he was awarded a Bronze Star, a Silver Star, and three Purple Hearts.

57. Mapp v. Ohio, 367 U.S. 643 (1961).

58. 29 Chas. II, c. 3 (1677)

59. 7 Wm. IV & 1 Vict., c.26, s.IX (1837)

60. [CASES OF DISAPPOINTED HEIRS KILLING]

61. American Bar Association Model Code of Professional Responsibility, initially adopted in 1969. Hereinafter referred to as "the Code" or CPR.

62. American Bar Association Model Rules of Professional Conduct, Adopted 1983. Hereinafter referred to as the "Model Rules" or MRPC..

63. DR 4-101(C)(3)

64. See Kenneth F. Krach, *The Client-Fraud Dilemma: A Need for Consensus*, 46 Md.L.Rev.436 (1987)

65. Model Rule 1.6 (b) (1)

66. Rule 1.6, Revised Rules of Professional Conduct of the North Carolina State Bar, adopted by the North Carolina Supreme Court on July 24, 1997.

67. Louisiana State Bar Articles of Incorporation, Art. 16, Rules of Professional Conduct, Rule 1.6, LSA-R.S. foll. 37:221

“Rule 1.6. Confidentiality of Information

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services”.***

68. 372 N.Y.S.2d 798, N.Y..Co.Ct. 1975

69. *Id.* at 803

70. 376 N.Y.S.2d 771, N.Y.A.D. 1975

71. 41 N.Y.2d 60, 359 N.E.2d 277, N.Y. Dec. 20, 1976

72. Monroe H. Freedman, UNDERSTANDING LAWYERS’ ETHICS, Matthew Bender, 1990, Chapter 8. “Cross-Examining to Discredit the Truthful Witness”

73. “A lawyer should act....with zeal in advocacy upon the client’s behalf.” Comment to Rule 1.3 MPRC

74. Rule 3.4(b), MPRC

75. U.S. ex rel Wilcox v. Johnson, 555 F.2d 115 (C.A.3, 1977)

76. State v. Henderson, 205 Kan. 231, 468 P.2d 136, 64 A.L.R. 3d 375, Kan. 1970

77. See, e.g., J. Michael Callan and Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 Rutgers L.Rev. 332 (1976) (disclosure should not be made since to do so would be tantamount to disclosing that the client is guilty of the crime charged); M. Freedman, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 3-4 (1975). Compare ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Defense Function s 7.7(c) (1971) (attorney should not disclose client's intention) with ABA Code of Professional Responsibility and Canons of Judicial Ethics, DR 4-101(c)(3), at 17 (disclosure should be made).
78. 475 U.S. 157 (1986)
79. Whiteside v. Scurr, 744 F.2d 1323 (1984)
80. *Id.* at 990
81. See *infra* note 65
82. J. Alexander Tanford, *The Ethics of Evidence*, 25 Am.J.Trial.Advoc. 487, 2002
83. 46-JAN Orange County La. 20
84. *Id.*
85. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. B. Found. Res. J. 926
86. *Id.* at 927-928
87. *Id.* at 929
88. Timothy P. Terrell, "Negotiation Ethics: Honesty, Facts, and Truth", The 1999 Symposium Issue of the Professional Lawyer, p. 119
89. For an excellent discussion of negotiation, game theory and the inefficiency of deception-based negotiation, see Geoffrey M. Peters, "The Use of Lies in Negotiation", 48 Ohio St.L.J. 1, 1986
90. Webster's Ninth New Collegiate Dictionary 1988
91. Rule 11 of the Federal Rules of Civil Procedure - Under Rule 11, attorneys (and pro se litigants) certify--by submitting pleadings and motions to a court--that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary

delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Civ. P. 11(b) (emphasis added). Courts may impose sanctions-- including monetary sanctions--"upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." Fed. R. Civ. P. 11(c).

92. See Robert S. Adler, *Good Faith: a New Look at an Old Doctrine*, 28 Akron L. Rev. 31 (Summer, 1994) "The parties to a contract are deemed not at arm's length when they have a special relationship, either confidential or fiduciary. In such relationships the law imposes additional duties beyond those required in an arm's length transaction upon one of the parties resulting in "heightened" protection for the other party. In these relationships the law establishes a duty of full disclosure, utmost good faith, and fair dealing." (Citing W. Page Keeton et Al., *Prosser and Keeton on the Law of Torts* § 106, at 738 (5th ed. 1984))

93 Section 2-503 of the Uniform Probate Code now provides a dispensing power in the courts to excuse failure of a testator to comply with the technical requirements for execution of a will, as long as the proponent can prove by clear and convincing evidence that the decedent intended the proffered document to have testamentary effect.

Restatement of the Law Third, Property, Wills and Other donative Transfers, Sec. 3.3 contains similar language. To date only a small number of jurisdictions including Colorado, Hawaii, Michigan, Montana, South Dakota and Utah have adopted UPC Sec. 2-503.

94. See *infra* note 67