HONESTY IS SUCH A LOVELY WORD: IS IT TOO MUCH TO ASK?

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As Richard Nixon was on his way to becoming the only president of the United States to give up the office, he insisted he was not a crook. Not long after, he resigned because his campaign minions had burgled an office. Lance Armstrong repeatedly cited hundreds of drug tests as proof he had not cheated in order to win the Tour de France seven times. Now he has confessed to Oprah and has been sued by the businesses that paid millions for his endorsement. For decades, Bernie Madoff was able to convince not only hundreds of investors but also the SEC that his Ponzi scheme was a legitimate investment plan. Now he plans to spend the rest of his life in a federal prison. And while Pope Benedict XVI was universally praised as a good man, part of his legacy is a scandal over the Vatican bank laundering money.

WILL IT NEVER END?

When the rich, powerful, and self-righteous are caught lying, stealing, or cheating, the headlines can be huge and the sentences can be stiff. But fear of hard time and humiliation apparently isn't enough to discourage bad behavior. Maybe that is because we are so quick to forgive – after all, it didn't take long for Martha Stewart and Eliot Spitzer

to get back on TV. And maybe we are quick to forgive because we know the rich, powerful, and self-righteous aren't so different from the rest of us. It seems all of us lie, steal, and cheat, at least a little.

It happens at work and in school. In a 2012 survey, 52 percent of employees in Fortune 500 companies reported observing misconduct in their workplace in the previous month. *National Business Ethics Survey of Fortune 500 Employees: An Investigation into the State of Ethics at America's Most Powerful Companies* 2 (Ethics Resource Center, 2012). Last year, Harvard expelled 70 students and put others on disciplinary probation for cheating on a take-home exam in a government class. Richard Perez-Pena, "Students Disciplined in Harvard Scandal," *New York Times*, Feb. 1, 2013 (accessed on December 20, 2013 at http://www.nytimes.com/2013/02/02/education/harvard-forced-dozens-to-leave-in-cheating-scandal.html?_r=0).

Of course, it isn't just Americans. In the United Kingdom, more than 45,000 students at 80 institutions were found guilty of academic misconduct over a three year period. And a 2010 study of applications to American colleges by Chinese students found that 90% of the recommendation letters were fake, and 70% of the essays with those applications were written by someone other than the applicant. *Holly Finn, Where Have All the Cowboys Gone?* Wall Street Journal, Sept. 21, 2012 (accessed on December 20, 2013 at

http://online.wsj.com/article/SB10000872396390443995604578004344133565834.html?KEYWORDS=%22where+have+all+the+cowboys+gone%22).

CAN'T SOMEBODY DO SOMETHING ABOUT IT?

For eons, God has tried to curb dishonesty by issuing edicts such as The Ten Commandments, and by smiting miscreants. Working in concert with God to encourage truthfulness, mothers have washed their children's mouths with soap, fathers have spanked their kid's behinds, and in the 1940s, Rotary International adopted "The Four-Way Test," a "nonpartisan and nonsectarian ethical guide" that has been translated into more than 100 languages, which invites us to ask four questions:

> Of the things we think, say or do
> 1.Is it the TRUTH?
> 2.Is it FAIR to all concerned?
> 3.Will it build GOODWILL and BETTER FRIENDSHIPS?
> 4.Will it be BENEFICIAL to all concerned?

Governments also have also stepped in to encourage ethical behavior. The 2010 Wyoming legislature, for example, adopted as "the official state code of Wyoming" ten guiding principles it dubbed "The Code of the West." Wyoming's code is derived from the book "Cowboy Ethics" by James P. Owen, who founded by the Center for Cowboy Ethics and Leadership of Austin, Texas. Wyoming's code doesn't mention honesty per se, but certainly addresses it by implication. Here are Wyoming's guiding principles:

(i) Live each day with courage;
(ii) Take pride in your work;
(iii) Always finish what you start;
(iv) Do what has to be done;
(v) Be tough, but fair;
(vi) When you make a promise, keep it;
(vii) Ride for the brand;
(viii) Talk less, say more;
(ix) Remember that some things are not for sale;
(x) Know where to draw the line.

Wyo. Stat. 8-3-123 (2013).

Wyoming's code is not like the Ten Commandments or Sarbanes-Oxley. The Code of the West is aspirational only. It does not threaten eternal damnation or even small fines for breaking a promise or being disloyal. Of course, Wyoming's legislature and most governments also have passed laws that criminalize deceit and deception, as well as laws demanding affirmative disclosures and otherwise regulating loans, door-to-door sales, games of chance, and all kinds of transactions. And some governments have tried to encourage honesty by using "special" techniques such as water-boarding.

Still, people persist in lying and stealing. Based on eons of human experience, we have no reason to think it will ever stop, or that anything God, government, or good intentions can do is likely to make honesty less likely, yet we keep writing laws, rules, and codes aimed at discouraging dishonesty. Some of those codes are written by businesses and professional organizations of which we are a part, including bar associations. Let's look at some of those.

Business Ethical Codes

Open the website of almost any publicly-traded company or business of any size and you will find a page dedicated to values or ethics or guiding principles. Here are a few examples:

***From the website of a major national bank*:**

Ethics

> We strive for the highest ethical standards with team members, customers, our communities and shareholders.
>
> Honesty, trust and integrity are essential for meeting the highest standards of corporate governance. They're not just the responsibility of our senior leaders and our board of directors. We're all responsible.
>
> Our ethics are the sum of all the decisions each of us makes every day. If you want to find out how strong a company's ethics are, don't listen to what its people say. Watch what they do. This is even more important in our industry because everything we do is built on trust. It doesn't happen with one transaction, in one day on the job or in one quarter. It's earned relationship by relationship.
>
> Our customers trust us to protect their money. They trust us to keep their private information confidential. They trust our tellers to make transactions accurately and promptly. They trust our bankers to recommend the right products and solutions for their needs. They trust our financial advisors to give them the right financial advice. They trust our mortgage consultants to manage their application process completely, accurately and as quickly as possible. They trust our investment bankers to build the right financial models to analyze business trends, shape investment ideas, raise capital,

meet their strategic objectives and satisfy all their financial needs. We have to earn that trust every day by behaving ethically; rewarding open, honest, two-way communication; and holding ourselves accountable for the decisions we make and actions we take.

From the website of a Montana hospital that is part of larger chain:

Values

Excellence: We set and surpass high standards.
Caring Spirit: We honor the sacred dignity of each person.
Integrity: We do the right thing with openness and pride.
Stewardship: We are accountable for the resources entrusted to us.
Good Humor: We create joyful and welcoming environments.

From the website of an international energy company:

ETHICS POLICY

The policy of [this] Corporation is to comply with all governmental laws, rules, and regulations applicable to its business.
The Corporation's Ethics policy does not stop there. Even where the law is permissive, the Corporation chooses the course of highest integrity. Local customs, traditions, and mores differ from place to place, and this must be recognized. But honesty is not subject to criticism in any culture. Shades of dishonesty simply invite demoralizing and reprehensible judgments. A well-founded reputation for scrupulous dealing is itself a priceless corporate asset.
The Corporation cares how results are obtained, not just that they are obtained. Directors, officers, and employees should deal fairly with each other and with the Corporation's suppliers, customers, competitors, and other third parties.
The Corporation expects compliance with its standard of integrity throughout the organization and will not tolerate employees who achieve results at the cost of violation of law or who deal unscrupulously. The Corporation's directors and officers support, and expect the Corporation's

> employees to support, any employee who passes up an opportunity or advantage that would sacrifice ethical standards.
>
> It is the Corporation's policy that all transactions will be accurately reflected in its books and records. This, of course, means that falsification of books and records and the creation or maintenance of any off-the-record bank accounts are strictly prohibited. Employees are expected to record all transactions accurately in the Corporation's books and records, and to be honest and forthcoming with the Corporation's internal and independent auditors.
>
> The Corporation expects candor from employees at all levels and adherence to its policies and internal controls. One harm which results when employees conceal information from higher management or the auditors is that other employees think they are being given a signal that the Corporation's policies and internal controls can be ignored when they are inconvenient. That can result in corruption and demoralization of an organization. The Corporation's system of management will not work without honesty, including honest bookkeeping, honest budget proposals, and honest economic evaluation of projects.
>
> It is the Corporation's policy to make full, fair, accurate, timely, and understandable disclosure in reports and documents that the Corporation files with the United States Securities and Exchange Commission, and in other public communications. All employees are responsible for reporting material information known to them to higher management so that the information will be available to senior executives responsible for making disclosure decisions.

Why do businesses adopt such codes? According to the Society for Human Resource Management and the Ethics Resource Center, corporate ethical codes are designed to:

1. Raise ethical expectations (aspirational provisions)
2. Legitimize dialogue about ethical issues (communication provisions)
3. Encourage ethical decision-making (judgment provisions)
4. Prevent misconduct [and] provide a basis for enforcement (accountability and enforcement provisions)

Society for Human Resource Management & Ethics Resource Center, "A Guide To Developing Your Organization's Code of Ethics," p. 2 (accessed on December 19, 2013 at http://www.shrm.org/about/bylaws_ethics/pages/default.aspx).

In the codes quoted above and many others, the businesses insist they aim for “high” or “the highest” standards without being clear about exactly what that means. Whatever it means, none of the codes I found on-line prescribed any adverse consequences for unethical behavior. The closest they come is in the the energy company ethics policy quoted above, which insists that employees comply with the laws and regulations governing the industry.

That may be just as well because “[b]usiness ethics researchers have come to recognize that while a compliance-driven approach may help people become aware of the rules, it does little to cultivate, support, and build the moral competencies necessary for ethical strength.” *Leslie E. Sekerka, Compliance as a Subtle Precursor to Ethical Corrosion: A Strength-Based Approach as a Way Forward*, 12 Wyoming Law Review 277, 278 (2012). In fact, compliance-driven approaches may backfire, as Jonathan Macy of Yale Law School argues. He has gathered evidence suggesting that the intense regulation of the financial services industry in the United States has actually undermined ethical behavior among the investment banks, law firms, accounting firms, and credit reporting agencies that serve that industry. *Jonathan R. Macy, The Death of Corporate Reputation: How Reputation Has Been Destroyed on Wall Street* (2013). Macy argues that:

> Whereas these sorts of firms once depended on their reputations to attract and retain business, such firms no longer depend on maintaining their reputations as a key to survival. Instead, regulations often, either directly or indirectly, require companies that issue securities to retain various Wall Street service providers such as outside auditors, credit rating agencies, investment banks, and law firms. Because the demand for the services of these firms is driven by regulation, the firms don’t need to maintain their reputations in order to attract business. As such, reputation is no longer an asset in which it is rational to invest.

Id., at 4. So while ERC and SHRM emphasize that demanding compliance isn't enough to deter bad behavior and urge businesses to create ethical organizational cultures, and promote codes of ethics as an important element of such a culture (see generally http://www.ethics.org/ and http://www.shrm.org/Pages/default.aspx), Macy's argument suggests those measures may actually be counterproductive.

Ethical Codes in Law

Statements of ethics or values are common on the websites of major law firms. For example, the Texas law firm Vinson & Elkins has a webpage touting the firm's "First Principles." The firm says: "We are committed to the highest ethical standards, both in our service to clients and in our personal lives," and "[o]ur success depends on maintaining an impeccable professional reputation." (accessed on December 19, 2013 at http://www.velaw.com/overview/VinsonElkinsFirstPrinciples.aspx).

When it claims its professional reputation is key to its success, Vinson & Elkins is echoing the traditional economic model of reputation, but Professor Macy thinks "it is highly doubtful that law firms continue to follow this model, if they ever did, ... [because i]mproved information technology, the passage of the securities laws, and the increase in both in-house counsel and specialization of lawyers' functions have decreased lawyers' incentives to monitor their colleagues and, by extension, their firms." (*Id.*, p. 149.) Macy uses Vinson & Elkins as an example to prove his point. Lawyers at Vinson & Elkins issued fairness opinions that the court-appointed bankruptcy examiner in the Enron case

concluded were “crucial to Enron’s ability to complete” the fraudulent transactions that defrauded investors and bankrupted the company. (*Id.,* p. 157.) Vinson & Elkins was sued in the bankruptcy case and ultimately settled the claim against it by waiving $3.9 million in unpaid fees and paying $30 million to the Enron bankruptcy estate, which certainly seems like an admission of wrongdoing that should tarnish the firm’s reputation. But the firm did not have to disgorge the $162 million in fees it had received from Enron in the four years before bankruptcy, no lawyer from the firm was required to defend charges of professional misconduct, the partner responsible for the Enron account was later promoted to managing partner of the firm, and a few years later the firm became the first in Texas in which average partner compensation exceeded $1 million per year. *Id.*, pp. 156-57. As Macy says, “The better argument is that Vinson & Elkins’s reputation was enhanced, not tarnished, by its relentless representation of Enron....” And he offers a reason: “Clients like aggressive lawyers.” *Id.*, p. 158.

In other words, in enabling Enron’s deceptive practices, Vinson & Elkins enhanced its reputation, **not** for honesty and high ethical standards but for something else, something that is apparently far more marketable.

If Macy is right, then Vinson & Elkins’s “First Principles” are as hollow as Lance Armstrong’s denials of drug use. Perhaps we should be suspicious of any law firm or legal association that promulgates a code promoting standards of conduct. Perhaps we should be less trusting of the State Bar of Montana, which promotes good behavior relentlessly (its deskbook contains “Standards of Professional Courtesy to Clients,”

"Standards of Professional Courtesy Among Attorneys," "Standards of Professional Courtesy and Ethics Between the Judiciary and Attorneys," "Ten Commandments for Trial Lawyers," and "Montana Values." *State Bar of Montana, Lawyers' Deskbook and Directory* 279-83 (2013)), than of https://www.iadclaw.org/.the American Association for Justice, which does not tout any such codes on its website (accessed on December 20, 2013 at http://www.justice.org/cps/rde/xchg/justice/hs.xsl/default.htm).

Of course, whatever codes law firms and legal organizations may adopt, the only codes of ethics that really matter to lawyers are the ones imposed by the courts before which they practice. For lawyers in America, most such codes are based on the American Bar Association's Model Rules of Professional Conduct. *Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct* (6th ed., 2007).

Curiously, the ABA's Model Rules say almost nothing about honesty or truth. One sentence in Paragraph 2 of the Preamble (a portion of the rules that is not binding on attorneys) explains the lawyer's job as negotiator as seeking "a result … consistent with requirements of honest dealings with others," but no Rule in the Model Rules actually requires lawyers to deal honestly with anyone. The rules that address honesty most directly are the Preamble and Rules 3.3, 3.4, 4.1, and 8.4, which are reprinted with selected ABA comments in Appendix 1, which was compiled by Donald B. Kaufman of McNees, Wallace & Nurick, LLC, in Harrisburg, Pennsylvania. Those rules forbid making false statements of material fact, falsifying evidence, failing to disclose facts in certain

circumstances, and engaging in conduct involving dishonesty, but none of them (or any other model rules) requires lawyers actually to be honest in their dealings with others, or even encourages it. In fact, Comment [2] to Rule 4.1 concedes that honesty is too much to ask of lawyers in the context of negotiations:

> Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category….

The annotations to Rule 4.1 list ethics opinions that both condemn and condone lawyers' failure to disclose information that likely would have altered the settlement negotiations. In one case cited, a lawyer was not required to disclose the one-year life expectancy of his client when settling a workers' compensation claim for three years of benefits. *Id.* at 387. The annotation also cites articles excusing lawyers' lack of truthfulness in negotiations, explaining in one instance that the "fundamental question is not whether legal negotiators may use misrepresentations to further client interests, but when and about what they may permissibly dissemble." *Id.*

Even though the Model Rules say little about honesty, many lawyers have been prosecuted and some have been disciplined by state courts or ethics panels for conduct that involved dishonesty. Some interesting rulings compiled and summarized by Don Kaufman from Harrisburg, Pennsylvania, are attached as Appendix B.

ARE TRUTH AND HONESTY REALLY THAT IMPORTANT?

It is hard to find any person or entity who will publicly endorse lying, stealing, and cheating. Perhaps because there are no public proponents for deceit, few of the opponents bother to explain why honesty matters. The classic reason articulated by economists is that maintaining a reputation for honesty offers a competitive advantage to businesses. That rationale was spelled out in an ERC publication titled "Building a Corporate Reputation of Integrity: A Discussion Guide for Executives about Communications and Ethics." (accessed on December 20, 2013 at http://www.ethics.org/resource/building-corporate-reputation-integrity):

> Among all of an organization's assets, a good reputation may be the most important. It is also the easiest to lose and the most challenging to maintain. Executives and outside experts alike say a good reputation adds value to the organization, helping it secure investment capital, attract talented employees, win customers, and provide a reservoir of good will to draw on when troubles arise. In an age when companies are increasingly expected to contribute to societal welfare in addition to making profits, some commentators have suggested a good reputation provides a company with the social license to operate.

Assuming classical economists and the ERC are correct about the value of a good reputation in business, that rationale can explain why individual companies propound codes of conduct and it could explain why industry organizations (such as the ABA) try to promote honesty. It doesn't explain why regulators, churches, parents, and others expend so much energy promoting honesty and decrying dishonesty, but it certainly suggests that lying is viewed with great disfavor. Why, then, is it so common?

IS TRUTH AND HONESTY TOO MUCH TO EXPECT?

According to the Discovery Channel:

> [In a] study ... published in the Journal of Basic and Applied Psychology, [University of Massachusetts researcher Robert] Feldman and his team of researchers asked two strangers to talk for 10 minutes. The conversations were recorded, and then each subject was asked to review the tape. Before looking at the footage, the subjects told researchers that they had been completely honest and accurate in their statements, but once the tape rolled, the subjects were amazed to discover all the little lies that came out in just 10 minutes. According to Feldman, 60 percent of the subjects lied at least once during the short conversation, and in that span of time, subjects told an average of 2.92 false things.

(accessed on December 20, 2013 at http://curiosity.discovery.com/question/average-person-tell-lie).

Daniel Ariely, professor of psychology and behavioral economics at Duke University, who has studied dishonesty extensively, suggests:

> [O]ur behavior is driven by two opposing motivations. On one hand, we want to view ourselves as honest, honorable people. We want to be able to look at ourselves in the mirror and feel good about ourselves (psychologists call this ego motivation). On the other hand, we want to benefit from cheating and get as much money as possible (this is the standard financial motivation). Clearly these two motivations are in conflict. How can we secure the benefits of cheating and at the same time still view ourselves as honest, wonderful people?

Daniel Ariely, *The (Honest) Truth About Dishonesty* 27 (2012). Ariely's hypothesis suggests people are more concerned about their self-perceptions than about their reputations.

Ariely has found that most people cheat regardless of the amount of money to be gained or the probability of being caught, and people are more likely to be dishonest when they have watched someone else benefit from dishonest behavior, or are in a culture that gives examples of dishonesty. *Id.* 245. People also are more likely to be dishonest if they are creative, are tired or depleted, have a conflict of interest, or can rationalize their dishonesty. *Id.*

On the other hand, people are more likely to be honest when they are supervised, receive moral reminders, sign their name, or pledge to be honest. *Id.* So making witnesses swear oaths, reminding people of the Ten Commandments, and having people sign their tax returns are all effective ways of promoting (though not guaranteeing) honest behavior.

But nothing will make everyone act honestly all the time. And that may be a good thing. Deceit is actually an important social skill, a skill that is practiced not only by humans, but also by monkeys, birds, and elephants. *Katherine Harmon, The Social Genius of Animals*, Scientific American Mind 67, 70-71 (Nov./Dec. 2012). It is not just that we like to deceive other people, or use deceit to get what we want. We also expect to be fooled, and often want to be. How else can we explain our enchantment with magic and sleight-

of-hand? See generally, *Alex Stone*, *Fooling Houdini: Magicians, Mentalists, Math Geeks, and the Hidden Powers of the Mind* (2012).

As Billy Joel said, honesty is such a lovely word. But we have no reason to expect people to be honest, and though we regularly say we expect honesty of ourselves and others, the fact is most of us are dishonest routinely and all of us admire some acts that are dishonest. It just isn't black or white.

Appendix A
Model Rules of Professional Conduct:
Excerpts and Comments re Truthfulness

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[2] …. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others….

[3] …. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs….

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.3 Candor Toward The Tribunal - Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so

desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to

cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the

correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.4 Fairness To Opposing Party And Counsel - Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important

procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.1 Truthfulness In Statements To Others - Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. 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. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Rule 8.4 Misconduct - Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age,

sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Appendix B
Cases and Authorities re Lawyers' Duty of Honesty

Duty of Truthfulness in Personal Affairs

Attorney Grievance Com'n of Maryland v. Coppick, 69 A.3d 1092 (Md. 2013) (attorney's conduct in lying to lender regarding the status of attorney fees in litigation, which he had pledged as security for the loan, constituted a violation of rule of professional conduct prohibiting an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; attorney made use of his legal practice to obtain a loan and gave a security interest in an expected fee from his practice, but after expending the funds on personal debts, he misrepresented the results of his practice to avoid the payment of the loan or the collection of that collateral)

Attorney Grievance Com'n of Maryland v. Hall, 969 A.2d 953 (Md. 2009) (attorney's sexual relationship with client he was simultaneously representing in employment discrimination suit: created inherent conflict with client's interests that materially limited his representation of her case; violated Rule prohibiting lawyers from engaging in conduct that was prejudicial to administration of justice; violated Rule requiring lawyers to explain matters to client to extent reasonably necessary to permit client to make informed decisions about representation; but attorney's lies to client that he was not being unfaithful to her (client knew he was married, but not that he was having a concurrent affair with another woman - a former client; client found out, met the woman, and they both confronted him in his office; client also told his wife) did not violate Rules of Professional

Conduct prohibiting lawyer from engaging in conduct involving dishonesty or deceit. "An attorney's lies to his client concerning his romantic relationships with others is a completely different creature than an attorney's lies to his client about matters related directly to his legal representation of that client. In Comment 2 to Rule 8.4, it states that a lawyer should be "professionally answerable" for offenses that demonstrate that an attorney lacks the necessary characteristics to practice law. Rule 8.4 cmt. Comment 2 to Rule 8.4 makes clear that offenses involving "moral turpitude" that are unrelated to an attorney's fitness to practice law are outside the bounds of sanctionable conduct under Rule 8.4." Attorney indefinitely suspended with leave to apply for readmission after two years.

Attorney Grievance Com'n of Maryland v. Jordan, 873 A.2d 1161 (Md. 2005) (attorney willfully submitted fraudulent documents to her homeowner's insurer for rental reimbursement; attorney disbarred; citing RPC Preamble: "A lawyer's conduct should conform to the requirements of the law, both in professional and personal affairs.")

Fellner v. Bar Ass'n of Baltimore City, 131 A.2d 729 (Md. 1957) (attorney pleaded nolo contendere and paid $250 fine for using slugs instead of coins in a City parking meter; in disciplinary proceeding he denied the offense, but was found to have committed it; attorney permanently disbarred (!): "In the instant case, the offense committed by the appellant was not a casual or thoughtless one. The evidence supports the inference that he resorted to a deliberate and systematic practice of cheating the City by the use of slugs. Morally, the offense was as great as though he had stolen money deposited by

others in the meters, and amounts at least to 'fraud or deceit'. It is not without significance, as bearing upon his moral fitness, that he has never yet admitted that he did wrong. It was admitted in his answer to the petition filed against him in the Supreme Bench that he denied the offense in his testimony before the Grievance Committee, and in that answer he also denied under oath that he had committed the offense charged. Yet he did not take the stand before the Supreme Bench. This is not a criminal proceeding, in which the defendant has a right to stand mute. There is no constitutional right to practice law, and as was said in In re Meyerson, supra, 190 Md. at page 687, 59 A.2d at page 496: 'No 'moral character qualification for Bar membership' is more important than truthfulness and candor.'

We fully agree with the conclusion reached by the Supreme Bench, without dissent, that the appellant should be permanently disbarred.")

Truthfulness and Settlement Negotiations

State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Kruger, 2013 l 5870342 (Neb. 2013) (after receiving settlement offer of $800,000, attorney falsely promised to pay DHHS $130,000 to extinguish $400,000 Medicaid lien; RPC 3.3 violation; judgment of public reprimand).

Matter of Fee, 898 P.2d 975 (Ariz. 1995) (failure to disclose to settlement judge separate agreement requiring client to pay attorney fees in addition to those specified in settlement violates prohibitions against false statements to tribunal and against dishonesty; citing RPC 3.3 and 8.4; attorneys censured; case has interesting string cite of articles on legal negotiations and lying)

Lawyers' Professional Responsibilities and Liabilities in Negotiations, Douglas R. Richmond, Georgetown Journal of Legal Ethics, 22 GEOJLE 249 (2009) ("The overwhelming majority of lawyers are ethical. Even so, the paradoxical nature of negotiation leads reputable lawyers ruinously astray. The general perception that deception is permissible in negotiations fails to account for the situations in which it is not. Furthermore, because the process of negotiation varies by place and subject, it seems to be governed by shifting rules.

In fact, the ethics rules as applied to negotiation are relatively straightforward. Most problems are rooted in allegations of dishonesty by lawyers in communications with third persons. Lawyers can generally avoid professional catastrophe if they remember some simple precepts. In a nutshell, if lawyers speak on material issues of fact or law, they must do so honestly. Whether a particular statement of fact or law is material generally requires case-specific inquiry, although the existence and amount of insurance coverage are always material facts. Lawyers' duty of honesty clearly includes a duty to inform an opponent of a client's death or of clearly applicable insurance. Lawyers' duty of honesty also includes a duty to inform opposing parties of relevant facts (1) where a writing does not reflect the parties' agreement; (2) when they know that an opponent holds a mistaken belief that, if uncorrected, will substantially deprive the opponent of the benefit of its bargain, or will materially lessen that benefit; or (3) in the incredibly rare situation where they owe the opponent a fiduciary duty.")

Additional Articles re Ethics and Negotiation

GENDER AND ATTORNEY NEGOTIATION ETHICS, Art Hinshaw and Jess K. Alberts, Washington University Journal of Law & Policy, 39 WAUJLP 145 (2012)

DOING THE RIGHT THING: AN EMPIRICAL STUDY OF ATTORNEY NEGOTIATION ETHICS, Art Hinshaw and Jess K. Alberts, Harvard Negotiation Law Review, 16 HVNLR 95 (Spring 2011)

OLD PROBLEM, NEW MEDIUM: DECEPTION IN COMPUTER-FACILITATED NEGOTIATION AND DISPUTE RESOLUTION, Brian Farkas, Cardozo Journal of Conflict Resolution, 14 CDZJCR 161 (Fall 2012)

NAVIGATING THE MURKY WATERS OF UNTRUTH IN NEGOTIATION: LESSONS FOR ETHICAL LAWYERS, Deborah Schmedemann, Cardozo Journal of Conflict Resolution, 12 CDZJCR 83 (Fall 201

Other Cases of Note

In re Discipline of Tornow, 835 A.2d 912 (S.D. 2013) (attorney's conduct in his representation of city board of ethics investigating a written complaint against a certain respondent, falsely denying to respondent that he had presented to the board a matter outside the scope of the originally filed complaint, falsely denying to respondent that there had been a recording made of their telephone conversation, and falsely asserting to city attorney that the recorded conversation was obtained in his personal capacity outside the scope of his employment, violated rules of professional conduct prohibiting conduct

involving dishonesty, fraud, deceit or misrepresentation; where (the same) attorney representing city was aware that county state's attorney's office prosecuted city attorney's office conflict cases as a professional courtesy, attorney's legal advice to counsel representing his daughter on a traffic citation, leading counsel to file motion to dismiss daughter's prosecution on grounds that the state's attorney lacked jurisdiction, violated rules of professional conduct prohibiting concurrent conflicts of interest and prohibiting the use of information relating to the representation of a client to the disadvantage of the client; attorney gave legal advice, based on information obtained in his representation of the city, to his daughter's attorney who was representing her on a city charge, and attorney did not have city's permission to divulge city information to his daughter's attorney; "[Attorney's] repeated parsing of words and terms-"word-smithing" in his own words-amounts to misrepresentation and is a clear violation of the Rules of Professional Conduct. It is professional misconduct for a lawyer to violate these rules and engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(a); Rule 8.4(c). When representing a client, "a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person[.]" Rule 4.1. Misrepresentation can occur by "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." Comment, Rule 4.1."; "Every person who has the privilege to practice law has the responsibility to strive for being: A person of unquestionable integrity as he or she deals with the rights of people before the bar. A practitioner of the legal profession does not have the liberty to flirt with the idea that the end justifies the means, or any other rationalization that would excuse less than complete honesty in the practice of the

profession. Certainly our Rules of Professional Conduct allow no such flirtation." (Emphasis added.)

In re Disciplinary Proceeding Against McGrath, 308 P. 3d 615 (Wash. 2013) (disbarment was warranted for attorney who intentionally filed a false claim in a bankruptcy proceeding, failed to maintain complete or accurate trust account records or to reconcile his check register against his account balance, attempted ex parte communications with a United States Bankruptcy Court judge, made false statements and claims against his wife's bankruptcy estate and bankruptcy estate of LLC, and deposited personal and client funds in his trust account, where attorney had prior discipline, including disbarment following a conviction for assault in the second degree with a deadly weapon, a dishonest and selfish motive, a pattern of misconduct, multiple offenses, substantial experience in the practice of law, and he refused to acknowledge the wrongful nature of the misconduct)

In re Calahan, 930 So.2d 916 (La. 2006) (disbarment was appropriate disciplinary sanction for attorney's misconduct, which included defrauding a legally blind woman into signing a contingent fee agreement, forging an endorsement on a settlement check, forging a signature on an affidavit, making a false accusation in a pretrial memorandum that a police sergeant may have had a sexually intimate relationship with a convicted felon, and blatantly violating confidentiality rule regarding complaints filed with Judiciary Commission)