

“IF YOU CAN’T TRUST YOUR LAWYER . . . ?”

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Of course lawyers lie. Some lawyers. They do it daily in their pleadings and in their briefs—to their clients and to their colleagues and to the courts. And, of course, clients lie to their lawyers. Some clients.

One problem with lawyers lying is that deceit is facially repugnant to a system that aspires to find the truth in human conflict and intercourse. The lawyer’s role, both as an advocate and as an officer of the courts, is critical to achieving that mission and enhancing public confidence in the administration of justice and the integrity of the process of law.

How, then, can lawyers lie, or engage in deceit? Very simply, they should not; but obviously more than a few lawyers do it. One reason, perhaps, lies in the reality that our justice system is a forum politic that accommodates, like the diverse society it serves, ambiguity, exaggeration, cleverness, and, on occasion, something less than the “whole truth and nothing but the truth.”

This tolerance to deception is encouraged by the profession’s institutional civility. Seldom is a fig called a fig, or a shyster a shyster. No, our euphemisms are wonderfully polite: “frivolous conduct,” or a “lack of candor;” or “law-office failure;” or, heaven forbid, a “peculation,” a “defalcation,” or a “negative balance” in a law firm’s trust account.

There is also widespread reluctance on the part of lawyers—again, some lawyers—to discuss publicly, much less acknowledge, that they have colleagues who engage in deceit and unprofessional conduct.

This reluctance is magnified when the brand of deceit involves the theft of client money and property, notwithstanding that most lawyers would agree that stealing from clients is the ultimate ethical transgression. For that reason alone, it is appropriate that our Rules of Professional Responsibility condemn the misuse of clients’ money and property, and impose strict fiduciary obligations on practitioners

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to safeguard and account for client property that comes into their possession.¹

The fact is, however, that theft of client property is not an insignificant or isolated problem within the legal profession. Indeed, it is a hounding phenomenon nationwide, and probably the principal reason why most lawyers nationwide are disbarred from the practice of law.²

While most of the deceptions cited in *Lying to Clients* fall short of classic notions of theft and embezzlement, it is interesting that Professor Lerman's catalogue of deceits begins with deceptive billing practices: running the meter, padding bills, settling clients claims at a discount to accelerate fees, etc.³ Were the test for billing deceptions simply: "Is it good, right, sensible or permitted?," the answer would be clearly and uniformly, "No."

It is equally unsettling to read that "[n]early all of the lawyers interviewed reported some amount of deception in practices relating to billing clients."⁴ When you consider that most of the lawyers in

¹ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1983) (requiring lawyers to safeguard and segregate client funds and property separately from their personal and business funds); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1981) (requiring lawyers and law firms to deposit client funds into identifiable bank accounts, into which they may not deposit their own funds except in specified situations).

² The American Bar Association's Center for Professional Responsibility, in responding to my inquiry, reported that 1069 lawyers nationwide were disbarred in 1988. Professional misconduct relating to economic offenses against clients resulted in 234 disbarments, or 22 per cent of all disbarments. The offenses include misappropriations (100 disbarments), embezzlement (5), commingling of funds (32), accounting for funds (23), loans to or from clients (10), illegal fees (2), overreaching, excessive fee (3), and failure to return fee (59). The category of misconduct cited for the next largest number of disbarments is general neglect: 100 disbarments. See generally MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 5.11 (1986) ("Disbarment is generally appropriate when: (a) a lawyer engages in serious criminal conduct, a necessary element of which includes . . . misrepresentation, fraud, extortion, misappropriation, or theft . . . ; or (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.").

³ See Lerman, *Lying to Clients*, 138 U. PA. L. REV 659, 705-20 (1990).

⁴ *Id.* at 705. Legal fees are not gifts from clients to lawyers. It should be elemental that they are to be earned in a legal engagement; and that a lawyer is obligated, as a fiduciary, to provide an honest accounting for their disbursement. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(B)(3) (1981). Moreover, the rules proscribe clearly excessive fees. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1981). They also require lawyers to refund unearned legal fees. See MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.16(d) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-32, DR 1-110(A)(3) (1981).

Professor Lerman's survey appear to have been associates or members of multi-member law firms, what emerges is hardly a flattering portrait of the morals of modern legal practice, the efficacy of law school courses in professional responsibility, or the ideals of our newer colleagues.⁵

The legal profession's traditional response to the misuse of law clients' property, whether petty or felonious, has been to invoke the lawyer disciplinary enforcement process, or the criminal justice system, or both.

On one level, disbarment is surgically neat and effective: it excises the offending lawyer from a profession that prides itself on its reputation for honesty and integrity, it protects the public from future predations by that individual, and it serves—or should serve—to deter similar conduct by other members of the bar.

This "washing of the hands" may make the profession feel better, but what of the victims of a dishonest and insolvent lawyer? Can a betrayed client who has lost a lifetime's savings find much solace in a court order of disbarment, or a lawyer's criminal conviction and incarceration? Will that client think better of the profession, or of lawyers, or of a court system that nurtured the lawyer as one of its officers?

No, and no one with experience in the disciplinary enforcement process can seriously argue that it was designed to deal with the economic consequences of a lawyer's theft. Those who know the process also know how devastating—economically and emotionally—those consequences can be: to clients and honest members of the bar alike.

Consider, for example, these recent disciplinary episodes involving former members of the New York bar:⁶

⁵ See Adams, *Unlicensed Associates Quit Sullivan, Winthrop*, N.Y.L.J., Dec. 18, 1989, at 1, col 3. The Law Journal is conducting a survey of unlicensed lawyers at the thirty largest law firms in New York State. See Adams, *Bar Gropes to Curb Unlicensed Lawyers*, N.Y.L.J., Dec. 21, 1989, at 2, col. 4. The survey presents a timely and apt example of the "slippery slope" of deception:

Faced with the pressure to pile up billable hours, some associates push aside the tedious task of completing the paperwork necessary to gain admission. If they fail to keep their firms up to date on their status, some lawyers suggested, they may find themselves in a position where to extricate themselves runs a risk of being exposed to a charge that they practiced without having been admitted.

Id.

⁶ These episodes involve actual claims presented to the Clients' Security Fund of the State of New York. Names are omitted to respect client privacy. The examples used are intended to be representative of the losses presented to Clients' Security

— Mother routinely cashes child-support checks as an accommodation for her divorced daughter. The payee on the checks is her former son-in-law, who had long ago authorized his former spouse to supply his endorsement on disability checks paid to him by his insurer. Then, when a dispute arises over the son-in-law's visitation rights to the children of the marriage, he complains to his bank that his endorsements have been forged.

Bank notifies the mother, who calls a prominent local lawyer recommended by a relative. The lawyer immediately arranges a late-night conference in his office. He warns his client that she is in exceedingly deep trouble. He instructs her to transfer the balances in all her bank accounts into his law firm's client trust account, there to be protected from attachment by her estranged son-in-law.

The lawyer, scrapped for cash, promptly steals \$106,000, mother's entire wealth. He repays her with numerous checks, all of which bounce. When his practice collapses shortly thereafter, more than 100 clients complain of thefts in excess of \$5,000,000.

— Another lawyer speculates, privately and successfully, in the stock market. In violation of federal securities laws, he establishes two investment funds as an adjunct to his law practice. Upwards of 300 investors subscribe. When the stock market crashes in October 1987, his investment scheme collapses, losing more than \$3 million dollars.

The lawyer attempts to conceal his bad fortune by looting law clients' trust and estate assets to meet scheduled interest payments to his investment clients. Thirteen law clients suffer thefts totalling more than \$500,000 when the Securities and Exchange Commission seizes the lawyer's assets.

— A third lawyer, from a growing suburban county, frequently lectures local real estate agents about the laws of real property and professional ethics. Not unexpectedly, he soon develops a thriving legal practice representing middle-class buyers and sellers of residential real estate.

He also designs a unique accounting statement for his clients' transactions. It is so complex and confusing that it will ultimately require a certified public accountant to establish that the lawyer rou-

Funds nationwide. Although there is no official reporter for determinations by these funds, the ABA/BNA *Lawyers' Manual on Professional Conduct* provides digests of court decisions that deal with ethical issues, including lawyer theft. *See, e.g.*, [Current Reports] *Law. Man. on Prof. Conduct* (ABA/BNA) 235 (Aug. 3, 1988) (summarizing *Clients' Security Fund v. Grandeau*, 72 N.Y.2d 72, 526 N.E.2d 270 (1988)).

tinely shortchanged law clients about \$2,000 each on every transaction. (Other clients who successfully decipher their statements readily excuse the "oversight" when the lawyer refunds their money and apologizes for the ineptitude of the "girls" in his law office.)

— Another lawyer specializes in negligence and medical malpractice litigation. His clients are largely urban poor, the elderly and minorities. He is retained by a 50-year old client who has been brain damaged as a result of a physician's malpractice in a municipal hospital. He repeatedly blames court congestion for delay and inaction in her proceeding.

In fact, however, the lawyer has already settled her claim with the hospital's insurer; but at an unconscionable discount in order to raise cash for himself, apparently to feed his drug addiction. He provides the defendant hospital with a forged general release from his client, forges her endorsement on the insurer's settlement draft, and steals the \$67,000 proceeds.

— A successful upstate lawyer is elected a county judge, prohibited by law from engaging in the practice of law. He nonetheless continues to counsel longstanding clients, sometimes in his courthouse chambers.

One of those clients is elderly, frail and financially comfortable. From her he takes \$100,000 to invest in mortgages for her portfolio. Instead, the money is diverted to a personal, and failing, business venture of the judge. He is later removed from the bench, and resigns from the bar. He publicly promises to make restitution and then files for bankruptcy.

— A young lawyer in New York City becomes a regular guest on a popular radio call-in program. She exaggerates her credentials as an expert matrimonial lawyer, specializing in spousal abuse at cut-rate prices; but with fees payable in advance. She is unable to cope with her high-volume practice, but turns no client away. When her practice collapses and she resigns from the bar, 25 clients find that their legal files are bare, except receipts for legal fees already paid.

Despite the variety of facts in these examples, they have much in common with the deceptions in Professor Lerman's survey. In each, the client is typically unsophisticated. The lawyer exploits the power and information that flows openly from a client to a fiduciary/lawyer. The lawyers' deceptions, by commission and omission, are self-serving in the extreme. The clients' trust in these lawyers is nearly blind and complete. Also, most of these deceptions occur in private offices

and conversations, off the record. Only serendipity and the lawyers' ineptitude as criminals exposed their dishonesty and deceit.

There are other common threads. These lawyers were all sole practitioners,⁷ unable to afford restitution to avoid disbarment or criminal prosecution. Contrary to popular belief, malpractice insurance does not protect against lawyer dishonesty or theft;⁸ and lawyers who steal rarely, if ever, have bank accounts at Credit Suisse.

Indeed, naked greed is seldom the motivating factor in the theft of client funds. Typically, lawyers who steal are struggling to maintain a marginal practice. They have stolen clients' money several times over the course of months, or even years. And hope springs eternal that good fortune will shortly enable these lawyer to restore shortages in their clients' trust accounts. It is a path down a slippery slope—robbing Peter to pay Paul, and then robbing Paul and the remaining apostles.

In the actual arena of disciplinary enforcement, it is rare not to find concrete factors that contributed to a lawyer's misuse of clients' money and property. They include the costly economic demands associated with meeting a law firm's payroll and overhead expenses; a lawyer's inability to keep abreast of developments in the law; alcoholism and substance abuse; gambling; marriages on the rocks; personal and family health problems; and foolhardy speculations by lawyers in business ventures unrelated to the practice of law.⁹

But enough about these dishonest lawyers. What happened to their clients?

The answer is that the lawyers of New York State reimbursed

⁷ Most claims seeking reimbursement for theft of client funds in the practice of law involve solo practitioners in general practice. See New York Client Security Fund, Annual Report of the Board of Trustees for the Calendar Year 1988, at 18 (1989) (on file with the *University of Pennsylvania Law Review*) [hereinafter Annual Report].

⁸ See R. MALLEEN & J. SMITH, 2 LEGAL MALPRACTICE § 28.19, at 753 (1989) (legal malpractice insurance policies typically do not cover "any dishonest, fraudulent, criminal or malicious act or omission of the Insured, any partner or employee" (case citations omitted)). But see *Clients' Security Fund v. Grandeau*, 72 N.Y.2d 62, 526 N.E.2d 270 (1988), in which the court sustained a complaint in malpractice against the law partner of a dishonest lawyer under a theory of negligence in failing to prevent the theft of money from the firm's clients. The defendant's malpractice policy excluded claims arising "out of or in connection with any dishonest, fraudulent, criminal or malicious act or omission of any Insured, or any partner, employee, associate officer, stockholder or member of any Insured, or any other persons for whose act any Insured is legally liable," but did cover losses arising from negligent malpractice. The defendant's malpractice insurer ultimately settled the Fund's claims for awards of reimbursement paid to the law firm's clients. See Annual Report, *supra* note 7, at 20.

⁹ See Annual Report, *supra* note 7, at 18.

these victims through the Clients' Security Fund, a special trust created by statute and financed by a statewide registration assessment.¹⁰

There are upwards of 100,000 members of the New York bar,¹¹ and all but retired lawyers and judges contribute \$50 biennially to finance the administration of the Fund and its program of reimbursement for clients of dishonest lawyers.¹²

It is an active institution: since its creation in 1982, the Fund's Board of Trustees—five lawyers and two business executives¹³—has reimbursed upwards of 1500 law clients more than \$13,000,000 for losses caused by dishonest conduct in the practice of law by fewer than 200 members of the bar.¹⁴

New York State is not alone in this endeavor. There are similar funds in 49 states and the District of Columbia,¹⁵ in several common-law nations, and in the Canadian provinces.¹⁶ With few exceptions, losses covered by the New York fund would qualify for reimbursement from security funds in other American jurisdictions.¹⁷

Regrettably, too few members of the profession—and far fewer members of the public—know much about these special programs to protect law clients.¹⁸ Given their mission to promote public confi-

¹⁰ See N.Y. JUD. LAW, § 468-b (McKinney 1989); N.Y. STATE FIN. LAW, § 97-t (McKinney 1989).

¹¹ See Annual Report, *supra* note 7, at 3.

¹² See *id.* at 13.

¹³ See *id.* at 7. The Trustees are appointed by the State Court of Appeals, and serve without compensation. See N.Y. JUD. LAW § 468-b(1) (McKinney 1989).

¹⁴ See New York Clients' Security Fund, Annual Report of the Board of Trustees for the Calendar Year 1989 (1990) (forthcoming).

¹⁵ See Annual Report, *supra* note 7, at 1.

¹⁶ See Lawyers Manual on Professional Conduct (ABA/BNA) 45:22002.

¹⁷ See AMERICAN BAR ASSOCIATION, MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION Rule 10 (1989), which states:

C. As used in these Rules, "dishonest conduct" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value, including but not limited to: (1) Refusal to refund unearned fees received in advance as required by Rule 1.16 of the Model Rules for Professional Conduct; and (2) The borrowing of money from a client without intention to repay it, or with disregard of the lawyer's inability or reasonably anticipated inability to repay it.

Id.

¹⁸ The American Bar Association's Standing Committee on Lawyers' Responsibility for Client Protection is attempting to remedy the problem of "secret" funds, which is really a problem of inadequate financing for funds in most states. In August 1989, the House of Delegates of the American Bar Association approved the Committee's revision of the 1981 original *Model Rules for Clients' Security Funds*. The

dence in the administration of justice and the integrity of the legal profession, these funds for client reparation and protection represent one of the legal profession's major reforms in the field of lawyer discipline, client protection, and public service.¹⁹

Reform, whether for the courts or the profession, is not a sport for the shortwinded. Persistence is all, and progress is sometimes frustratingly slow. Nonetheless, responsible bar leaders and professionals in the field of professional discipline increasingly recognize that Lawyers' Funds for Client Protection²⁰—the American Bar Association's recently recommended model name for Clients' Security Funds—are essential adjuncts to well-structured and public-spirited lawyer disciplinary enforcement systems.

Law client protection funds bring a fresh perspective to dishonest conduct in the practice of law. They serve to monitor the ethical health of the profession in its most basic commerce with clients. Their unique day-to-day experience with dishonest conduct in the practice of law provides bar and judicial leaders with the opportunity to repair deficiencies in existing disciplinary systems and court rules which encourage or permit dishonest conduct in the practice of law.

Professor Lerman's proposal for a uniform disciplinary standard for billing clients²¹ would eliminate many unnecessary conflicts with clients, as well as the many opportunities for shady practices that currently abound. While the proposed standard is probably too detailed for nationwide application to firms of every size and law practices of every type, I suspect that legal consumers would find comprehensive disclosure in this aspect of legal commerce a refreshing breath of fresh air.²²

revised rules propose the standard that the Supreme Court in each state require that its fund be financed by mandatory and periodic assessments on all practicing lawyers in the jurisdiction. See MODEL RULES FOR CLIENTS' SECURITY FUNDS Rule 3, Rule 3 comment (1989). The revised Rules also propose that the fund's board of trustees be required to publicize its activities to the public and the bar. See *id.* Rule 7 (D), (E); Rule 17 comment.

¹⁹ See Palermo, *Clients' Security Funds Help Our Professional Image*, 56 N.Y. ST. B.J., Oct. 1984, at 10-12; Note, *Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility*, 10 U. MICH. J.L. REF. 415, 423-32 (1977); Note, *Pennsylvania Clients' Security Fund — How Secure is the Public?*, 22 VILL. L. REV. 452, 452-68 (1977).

²⁰ See MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION (Preamble) (1989).

²¹ See Lerman, *supra* note 3, at 750-52.

²² Any new rule on billing practices should address two other unsettled and nettlesome ethical problems: how lawyers account for legal fees paid in advance, see Brickman, *The Advance Legal Fee Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account?*, 10 CARDOZO L. REV. 647 (1989); and

The legal profession works effectively only in an atmosphere where clients extend full trust to its practitioners. The breach of that trust by even one lawyer fouls the environment for every member of the profession and, of course, its collective and historic reputation for honesty and integrity in dealing with client money and property.

Yes, some lawyers lie, cheat and deceive their clients. But they are the exception, and an embarrassment to most lawyers. That is good news. But so too is the fact that lawyers individually, and the bar collectively, have the professional obligation²³ to participate in reimbursement programs for clients who have lost money or property as a result of a colleague's dishonest conduct, whether it be called deceit, conversion, embezzlement, or theft.

the propriety of so-called "nonrefundable retainers." *See, e.g.,* *Jacobson v. Sassower*, 66 N.Y.2d 991, 489 N.E.2d 1283 (1985).

²³ *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 comment (1983); MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION Rule 1(B) (1989).

