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How Not to Lie

A Don't-Do-It-Yourself Guide for Litigators

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Over the past few years, a number of high-profile attorneys have been sanctioned or suspended from the practice of law because they lied. The instance that probably received the greatest media attention came in June of 2021, when the Appellate Division of the Supreme Court of the State of New York ordered the immediate suspension of Rudy Giuliani's license because he had made demonstrably false statements to the courts, lawmakers, and the public at large concerning the 2020 presidential election. In a 33-page opinion, the court considered the arguments Giuliani raised in his defense but concluded that his pants were indeed on fire.

About a year later, in August of 2022, the New York City Bar Association issued a detailed report that sternly cautioned lawyers against lying. The report was prompted by statements made by attorneys representing former president Donald Trump in connection with the Federal Bureau of Investigation's execution of a search warrant at his home at Mar-a-Lago. The document expressed concern that false statements in this highly charged context were corrosive to trust in public institutions and could provoke violence against judicial and law enforcement officers.

Alas, big-time attorneys representing big-time clients in big-time cases have not held a monopoly on lying. In an article posted on June 30, 2022, the *Legal Profession Blog* reported on a married Ohio lawyer who entered into a sexual relationship with a client he was representing in a divorce case. In the course of

pursuing the two-year relationship, the lawyer lied to his opposing counsel, his wife, the police officer husband of the woman with whom he was having the affair, and the police department in which the officer worked. This misbehavior was particularly worrisome because, at the time, the lawyer was also running for election as a judge.

The lawyer admitted the misconduct and apologized. He was nevertheless suspended from the practice of law for a year, with six months of the penalty stayed if he fulfilled certain conditions. As the blog post noted, it was a case “involving sex and lies but no videotape,” the last part of which may leave us thankful.

As a general proposition, people shouldn't lie. As a general proposition, lawyers are people. And, as a general proposition, “don't lie” seems like a pretty straightforward directive. Nevertheless, it appears that—across the profession—we're having trouble figuring out how not to lie. And disciplinary authorities seem to be expending a disproportionate amount of ink and energy telling us that we shouldn't do it.

One might think that conveying and honoring this simple lesson wouldn't require so much effort. But we are a famously self-regulating profession that has self-regulated itself into a situation of much greater complexity. As a result, we have developed a bundle of rules to help us determine when our nose is officially growing longer.

Those rules vary from jurisdiction to jurisdiction, but in general they follow the lead of the American Bar Association’s Model Rules of Professional Conduct. I will consider here the guidance offered by those rules, particularly for us litigators. Of course, not all lawyers who lie are litigators, but at present litigators appear to be the overachievers in this department.

Spoiler alert: The rules I am about to discuss are not always helpful. To the contrary. But let’s not get ahead of ourselves.

Start with Model Rule 4.1

ABA Model Rule 4.1 provides a good place to start. It states that “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.” In its simplicity and breadth, this directive might remind us of the Ninth Commandment: “Thou shalt not bear false witness against thy neighbor.” As I noted above, this seems like a pretty straightforward idea.

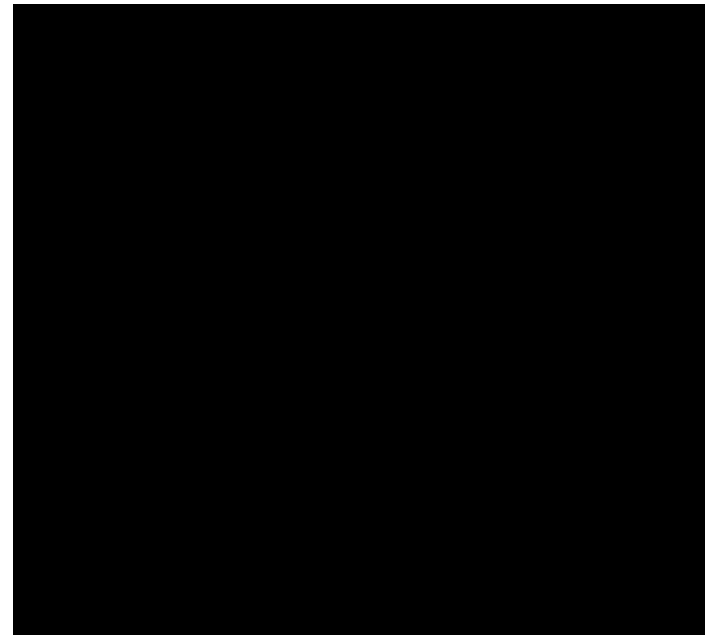
But Rule 4.1 appears in a document in which lawyers engage in the intrinsically conflicted project of limiting their own behaviors. As a result, the prohibition against lawyer lying in this rule ends up having a byzantine intricacy to it. Indeed, Rule 4.1 gives us the Ninth Commandment as it might look if it had been written and annotated by a self-interested committee of miscreants instead of by God.

If we look closely at the text of Rule 4.1, we immediately notice an oddity about its breadth: The rule doesn’t prohibit lawyers from lying to their clients, even though that would seem to be the lying that should most concern us. Nor, for that matter, does such a prohibition appear in the text of Rule 1.4, the rule that governs lawyer communications with those whom they represent. The principle that we shouldn’t lie to our clients is missing in action.

This conspicuous lapse is apparently part of a long-standing tradition dating back to the earliest of our legal ethics codes. Those codes evidently viewed the proposition as so self-evident as to require no declaration and no rule. See Lisa Lerman, *Lying to Clients*, 138 PENN. L. REV. 659, 661 n.2 (1990). I respect the power of tradition, but the proposition that some things are so obviously prohibited that we don’t need to prohibit them seems singularly weird.

Moving beyond this pregnant omission, Rule 4.1 necessarily raises the following question: “What constitutes a lie?” The answer would seem easy enough to discern. Dictionary definitions differ in their details but tend to focus on three components: (1) a person made an affirmative statement, (2) the person who made the statement knew it was false, and (3) the person who made the knowingly false statement did so with the intent to deceive. A separate, normative point would also seem basic enough: Lying is bad. Often, it is very bad.

As to both of these seemingly obvious propositions, however, Rule 4.1 says: “Not so fast.” The rule introduces layers of



complications. And within that complexity lie traps not only for the dishonest lawyer but also for the well-intentioned but unwary one.

The first complication is that, although dictionary definitions of a “lie” usually include no such limitation, by its terms Rule 4.1 applies only to *material* misstatements of fact or law. So, apparently, a lawyer can lie about things, just not about material things. What are those? How can we tell the material from the immaterial? It’s unclear.

A second complication is that the text of Rule 4.1 refers to “statements,” which we normally understand to mean things that were explicitly and positively communicated. The comment to the rule, however, states that “[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” In other words, partial truths may qualify as falsehoods, and omissions may qualify as statements, but only sometimes—when they meet a “falsehood equivalence” test.

How do we know when that test is satisfied? The comment doesn’t say. It just tells us that sometimes things that are *partially true* will be treated as if they were *entirely false*, and sometimes things that *aren’t* statements will be treated as if they *were* statements. Presumably, we will find out when those “sometimes” arise because a lawyer disciplinary body will tell us so.

Yet a third complication (in some ways, the mirror image of the second) is that the comment to Rule 4.1 also says that sometimes things that *are* lies aren’t *treated as* lies. The comment says:

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

Illustration by Lisa Haney

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. . . .

Therefore, the statement "My client will pay \$100,000 and not a nickel more"—even if untrue, known to be untrue, and offered for the specific purpose of misleading the other party about the client's willingness to pay—evidently does not qualify as a lie. Of course, it's also not the truth. It's apparently some other sort of thing.

Within Rule 4.1's complexity lie traps not only for the dishonest lawyer but also for the well-intentioned but unwary one.

When will we know that a statement qualifies as that other sort of thing? It depends "on the circumstances."

One of the great animating forces in the law is irony. Little wonder, then, that the title of Rule 4.1 (Truthfulness in Statements to Others) is—wait for it—affirmatively misleading. As the preceding discussion shows, the rule plainly requires no such thing as truthfulness in statements to others. Instead, it requires truthfulness, more or less, in statements (and sometimes non-statements) made to some others (but not to all others), depending on the circumstances.

Rule 3.3 and Candor

Rule 3.3, Candor Toward the Tribunal, also addresses issues of misrepresentation. Here, though, the concern relates to statements made and evidence offered in court. In this context, and in at least some circumstances, the rules require the lawyer to do more than refrain from lying. The lawyer must be affirmatively honest. The lawyer must be candid.

Rule 3.3 requires nothing like complete candor on the part of lawyers, and it couldn't do so without undermining the adversary

system in which we operate. Indeed, complete candor would turn every judicial proceeding into a *Saturday Night Live* skit in which lawyers shared their strategies, disclosed their secrets, and confessed the weaknesses of their cases. ("Oh, gosh, did I say 'My client pleads not guilty,' Your Honor? Here, let me change that.") Rule 3.3 accordingly requires candor only in certain specified situations.

If a lawyer has previously misrepresented something to the court, then Rule 3.3 requires the lawyer to acknowledge the error and correct the record. In addition, Rule 3.3 requires a lawyer to inform the court about controlling adverse authority, even where the lawyer's opponent hasn't done so. In these circumstances, the rule makes candor to the court paramount and responds to the demands of the system by saying, in essence, "adversary shmadvorsary."

The most complicated dimension of Rule 3.3, however, deals with the offering of false testimony and other false evidence. Of course, the rule prohibits lawyers from knowingly engaging in such conduct—for example, calling a witness who the lawyer knows will hold the courtroom spellbound with his or her mastery of perjury. But it also requires lawyers to take remedial measures if they discover that they have inadvertently put such evidence into the record.

In some contexts, applying this rule doesn't seem unduly difficult. If the witness tells the lawyer that the witness plans to lie, then the lawyer can say, "Don't do that." If the witness tells the lawyer that the witness already has lied, then the lawyer can say, "We have to fix that."

Let's assume, however, that people who lie aren't always honest about having done so. Liars can be like that. When do the rules nevertheless charge the lawyer with "knowing" that a witness swore to tell the truth and then did just the opposite? I have previously referred to this as the "soft-core perjury" problem. See Len Niehoff, *Soft-Core Perjury*, 36 LITIGATION 8 (Spring 2010).

With respect to this problem, the comment provides advice that seems less than entirely useful. It says:

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.

Well, OK, then.

In sum, this comment provides: (1) The lawyer should give the client the benefit of the doubt. So the fact that the lawyer has a reasonable belief that the client has lied doesn't trigger

the duties imposed by this rule. By logical extension, the fact that *all* reasonable people would believe that the client has lied similarly fails to do so. (2) Nevertheless, the lawyer cannot ignore that which is obvious. When it is obvious that the client has lied, the duties under this rule are activated. (3) In order to ascertain whether the rule has been triggered, the lawyer will therefore have to determine the difference between (a) that which all reasonable people would believe to be a lie and (b) that which is obviously a lie.

Good luck with that.

Other Model Rules About Lying

With respect to statements made as part of judicial proceedings, it should be noted that Rule 3.1 (which in large measure echoes Rule 11 of the Federal Rules of Civil Procedure) also prohibits lying. The rule requires that lawyers have a non-frivolous basis for advancing any claim, defense, or position as to a controverted issue. The comment clearly indicates that the rule does not expect lawyers to have perfect knowledge; it simply demands that they operate in good faith. And “good-faith lie” is an oxymoron on the order of “hotel art,” “airline food,” and “family vacation.”

The final prohibition against lawyer lying appears in Rule 8.4, which states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” This provision cannot possibly mean what it says. Taken literally, it would categorize as professional misconduct every instance in which a lawyer—even when not acting as a lawyer—makes any statement he or she knows to be untrue. This would include the lawyer who tells her child that there’s no more chocolate in the house, the lawyer who prevaricates to get rid of a telemarketer, and the lawyer who begs off an invitation from an annoying relative by inventing other plans that don’t exist.

A rule like this isn’t just silly; it’s offensive. So expansive a rule suffers from substantial overbreadth. And so vague a rule fails to comply with basic notions of due process—as a constitutional principle, an idea that we lawyers have sworn to uphold and defend. Unless, of course, we were lying when we did so.

Lawyers Lying to Themselves

One last point: I have sought to demonstrate here that the rules around lawyer lying are riddled with ambiguities, loopholes, and nonsense. These are serious shortcomings, given that disciplinary bodies use them as a regulatory instrument. But the fact is that no ethics code—no matter how magnificently crafted—can reach the most pernicious (and probably the most common) form of lawyer lying: when lawyers lie to themselves.

One glance at disciplinary statistics strongly suggests that lawyers do this all the time—to justify stealing client funds, to justify

withholding information from clients, to justify taking on cases for which they don’t have the time or expertise, to justify improper conduct during discovery, and so on. And this reality raises a broader issue: Legal ethics codes may be necessary to the promotion of professional responsibility, but they are not sufficient.

History has proved this over and over again. The 1908 Canons of Legal Ethics were promulgated at least in part in response to Theodore Roosevelt’s criticism (in a Harvard commencement address) of the ways in which elite lawyers were helping wealthy clients subvert the law. See James M. Altman, *Considering the ABA’s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2403–04 (2003). Later rules and revisions were driven by scandals like Watergate and Enron. It seems likely that the outrageous behavior of some of the lawyers who challenged the results of the 2020 presidential election will breed still more rules and revisions. A clear pattern emerges: New mischiefs result in new regulations, but new regulations do not result in new virtues.

No ethics code can reach the most pernicious form of lawyer lying: when lawyers lie to themselves.

A longer conversation, well beyond the scope of this article, would explore the social science research that considers how we foster better behaviors through “ethical environments”—cultures and subcultures that help people construct an accurate, reliable, and durable moral compass. Such a conversation would also discuss failures of enforcement, which teach lawyers that their misconduct is unlikely to have any serious consequences and that, even if such consequences come, they will do so slowly, haltingly, and subject to appeal.

The key to improving lawyer behavior is not to find new ways to define and punish lying. The key is to create a professional culture and to foster legal practice environments in which the option of lying is not even considered. We clearly need to address the current and escalating crisis of lawyer lying. But we can’t do so effectively by sending out for fresh tablets and issuing additional commandments. We’ve seen how much good—or, more accurately, how little good—that has done us. ■