THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH

The Ethical Imperative for Honesty in the Practice of Law

A One-Hour Webinar Covering:

Legal Ethics

Presented by:

Sean Carter
CA Bar# 200356
OVERVIEW

Dr. Martin Luther King once said, “A fact is the absence of contradiction, but the truth is the presence of coherence.” As lawyers, we are duty bound to be more than just factual. Lawyers must tell the truth to clients, judges, and even opposing counsel and third parties. In this eye-opening webinar, legal humorist Sean Carter will deal frankly with the very human inclination for dishonesty and explain how to avoid the traps from which dishonesty most often springs. In doing so, he will draw upon current and past nominees from his annual Ethy Awards for the worst ethical behavior to provide poignant reminders of the consequences of dishonesty. In particular, this webinar will cover:

- Disclosure obligations at the outset of the representation
- Communicating fully with clients
- Candor towards the tribunal
- The duty of honesty to opposing parties and their counsel
- The duty of honesty to witnesses and third parties
- Truthful marketing practices
- Responding to disciplinary authorities
- The duty of honesty outside the practice of law

To maintain attendee interest and expedite the learning process, the presenter will use a mix of visual graphics, video clips and interactive elements, such as live polling.
“THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH”
TIMED AGENDA
(1 hr)

In this eye-opening webinar, legal humorist Sean Carter will deal frankly with the very human inclination for dishonesty and explain how to avoid the traps from which dishonesty most often springs. In doing so, he will touch upon the following legal ethics rules:

0:00-0:05 **Introduction** – Why Lawyers Sometimes Lie

0:05-0:15 **Disclosure obligations to prospective clients**
*Rule 7.1 – Communications Concerning a Lawyer’s Services*
A lawyer must not only avoid false and deceptive statements, but even those that may be misleading.

*Rule 7.4 – Communication of Fields of Practice and Specialization*
In order to tout themselves as certified specialists, lawyers must receive certification from recognized bodies.

*Rule 7.5 – Firm Names and Letterhead*
A lawyer may not state or imply partnership when it doesn’t exist

0:15-0:25 **Communicating fully with clients**
*Rule 1.4 – Communication*
Keeping clients abreast of the status of the matter
Telling the client the bad as well as the good
Responding to client requests for information
Increasing obligation to be always available

0:25-0:30 **Candor Towards the Tribunal**
*Rule 3.3 – Candor Towards the Tribunal*
Avoiding false or misleading statements
Citing controlling authority; even adverse decisions
Correcting past falsefoods

0:30-0:40 **Honesty to Opposing and Third Parties**
*Rule 4.1 – Truthfulness in Statements to Others*
Avoiding misstatements of fact or law
The “puffing” exception
Avoiding court room “tricks”

*Rule 4.3 – Dealing with Unrepresented Persons*
The affirmative duty to identify yourself
The prohibition against intentional misleading

*Rule 4.4(b) – Respect for Rights of Third Persons*
Informing opposing parties of inadvertent receipt of information
0:40-0:45  **Honesty to Disciplinary Authorities**

*Rule 8.1 – Bar Admission and Disciplinary Matters*

The biggest determining factor of punishment is honesty

Duty to self-report misconduct

There is no statute of limitations for lies or omissions upon bar application

When in doubt, disclose

*Rule 8.3 – Reporting Professional Misconduct*

The duty to report misconduct of others; even partners and friends

This duty may supersede obligations to the client

0:45-0:55  **Duty for Honesty Outside the Practice of Law**

*Rule 8.4 – Misconduct*

Criminal dishonesty (e.g., perjury, fraud, etc.) is actionable

All dishonesty, fraud, deceit or misrepresentation is actionable; whether or not law-related

0:55-1:00  **Q&A Session**

**Conclusion**
ABOUT THE SPEAKER

Sean A. Carter graduated from Harvard Law School in 1992. He was a corporate securities lawyer in private practice in large law firms in Boston and Los Angeles serving clients such as GNC, the Boston Beer Company, Experian, Safelite Auto Glass, J. Crew and many others. In 2000, he accepted a position as in-house counsel for a publicly-traded financial institution, at which he remained until October 2002.

Since that time, Mr. Carter has been a full-time lecturer, columnist, and legal commentator. His written have appeared in the Los Angeles Times, the Los Angeles Daily Journal, the ABA e-Report and on numerous blogs and websites, including Findlaw.com. He has been a guest on numerous radio programs across the country as well as online legal media outlets, such as The Legal Broadcast Network.

In addition, Mr. Carter delivers more than 100 MCLE presentations each year on topics such as legal ethics, professionalism, the elimination of bias, substance abuse prevention, constitutional law, etc. He has spoken for state and local bar associations, law firms, law schools and corporate in-house legal departments in more than 30 states. Here is a partial list of organizations that have engaged him to give MCLE presentations.

Bar Associations

11th Circuit Judicial Conference
Advocates’ Society (Canada)
Akron Bar Association
Alabama State Bar
Alabama Courts
Alameda County Bar
Alaska Bar Association
American Bar Association
American Bankruptcy Institute
American Board of Trial Advocates
American College of Trial Lawyers
ACTL New Jersey
State Bar of Arizona
Arkansas Bar Association
Association of Corporate Counsel
Association of So Cal Defense Counsel
Atlanta Bar Association
Bar Association of Southern Illinois
Bar Association of St. Louis
Bleckley Inn of Court
California Bankruptcy Forum
CA Society for Healthcare Attorneys
State Bar of California

Center for American and Internatl. Law
Charlotte Estate Planning Council
Chattanooga Bar
Cincinnati Bar Association
Collier County Bar
Colorado Bar Association
Connecticut Defense Lawyers Assoc
Continuing Education of the Bar
Dade County Bar
Dallas Bar
Dayton Bar Association
Dekalb County Bar
Defense Research Institute
Erie County Bar Association
Federal Bar Association
Florida Bar
Foothills Bar Association
Georgia Assoc of Crim. Def. Lawyers
State Bar of Georgia
Hillsborough County Bar Association
Hispanic Bar Assoc of Orange County
Houston Bar Association
Idaho State Bar Association
Illinois State Bar Association
Illinois ICLE
Indiana State Bar Association
Inn of Court - Shreveport
International Assoc of Gaming Advisors
International Assoc of Holistic Lawyers
International Society of Barristers
J. Franklyn Bourne Bar Association
Kansas Association of Defense Counsel
Kentucky Bar Association
Larimer County Bar (CO)
Lex Romano
Los Angeles County Bar Association
Louisiana Assoc of Defense Counsel
Maine Bar Association
Memphis Bar Association
State Bar of Michigan
Minnesota CLE
Missouri Association of Trial Attorneys
Missouri State Bar
Montana Assoc of Crim. Def. Lawyers
Montgomery County Bar Association
Nashville Bar Association
National Association of Bar Executives
Natl Network of Estate Planning Attys
Nebraska Assoc of Defense Counsel
State Bar of Nevada
New Hampshire Bar Association
New Hampshire Trial Lawyers Assoc
New Jersey ICLE
State Bar of New Mexico
New York State Bar Association
Ohio State Bar Association
Oklahoma Bar Association
Orange County Bar Association
Orange County Trial Lawyers Assoc
Oregon State Bar
Ottawa County Bar Association
Pennsylvania Bar Association
Pennsylvania Bar Association
Pennsylvania Bar Institute
Philadelphia Bar Association
Riverside County Bar
Salmon P Chase Inn of Court
Shreveport Bar Association
South Carolina Bar
Southeast Bar Association
Southern Law Network
State Bar of Texas
TX Assoc of Civ Trial and App
Utah State Bar
Virginia CLE
Virginia State Bar
Washington State Bar
Washoe County Bar
WealthCounsel
W San Bernardino County Bar Assoc
Wichita Bar Association
State Bar of Wisconsin

Law Firms

Akin Gump
Alston & Bird
Armstrong Teasdale
Arnstein & Lehr
Atkinson, Andelson, Loya, Ruud et al
Balch & Bingham LLP
Baker & Hostetler LLP
Baker, Manock & Jensen
Benesch, Friedlander, Coplan & Aronoff
Best, Best & Krieger
Brown & McCarroll
Cummins & White
Dickstein Shapiro
Drew Eckl & Farnham, LLP
Farella Braun + Marella
Finnegan
Fredrikson & Byron
Friedemann & Goldberg
Fisher & Phillips
Gibson Dunn & Crutcher
Hall Estill
Heller Ehrman
Henderson Franklin
Jones Day
King & Spalding
Kring & Chung
Larkin Hoffman Daly & Lindgren
Lewis Brisbois
Lionel Sawyer & Collins
Littler Mendelson
Looper Reed & McGraw
McDermott Will & Emery
McDonald Hopkins
McDonnell Boechnen et al
McGlinchey Stafford
Morgan Lewis & Bockius
Motley & Rice
Moore & VanAllen
Manatt Phelps
Perkins Coie
Quarles & Brady
Randick O’Dea & Tooliotos
Resources Law Group
Robins Kaplan Miller & Ciresi
Sheppard Mullin
Smith Gambrell & Russell
Sterne Kessler
Sutherland Asbill & Brennan
Troutman Sanders

Corporations

American Online
ARAG Insurance Group
Arizona Counties Insurance Pool
Boeing
Clorox
CVS Caremark Corporation
First Data
Health Management Association
Johnson Bank
Marathon Oil
New Century Mortgage
Sun Healthcare
Taco Bell
Xerox Corporation

Law Schools

Arkansas Little Rock
Brigham Young University
Thomas M. Cooley
Cumberland
Drake University
Florida State University
Georgia State University
Howard University
Loyola Marymount (LA)

Government Agencies

TN Administrative Office of the Courts
AL Administrative Office of the Courts
County Counselors of Kansas
Georgia State Board of Worker’s Comp
Missouri Public Defender System
Riverside City Attorneys Office
San Bernadino District Attorneys Office

Professional Associations

Assoc of Continuing Legal Education
Assoc of Legal Administrators
Legal Marketing Association
Natl Org of Home & Life Guar Assocs
Los Angeles Paralegals Association
Orange County Paralegals Association
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The Ethycal Imperative for Honesty in the Practice of Law

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Mr. Carter graduated from Harvard Law School in 1992. His ten years of legal practice focused on corporate securities and mergers and acquisitions. During this time, he represented such clients as GNC, Experian, The Boston Beer Company, Homeside Lending, Safelite Auto Glass, J. Crew and many others, before eventually serving as in-house counsel to a publicly-traded finance company.

In 2002, Mr. Carter left the practice of law to pursue a career as the country’s foremost Humorist at Law. Since then, Mr. Carter has crisscrossed the country delivering his Lawpsided Seminars for state and local bar associations, law firms, in-house corporate legal departments and law schools. Each year, he presents more than 100 humorous programs on such topics as legal ethics, stress management, constitutional law, legal marketing and much more.

Mr. Carter is the author of the first-ever comedic legal treatise -- *If It Does Not Fit, Must You Acquit?: Your Humorous Guide to the Law*. His syndicated legal humor column has appeared in general circulation newspapers in more than 30 states and his weekly humor column for lawyers appeared in the *ABA e-Report* from 2003 to 2006.

Finally, Sean lives in Mesa, Arizona with his wife and four sons.
INTRODUCTION

Over the course of reading thousands of disciplinary reports over the last decade, I have come across countless situations where lawyers have told lies, half-truths or omitted pertinent information. This is despite the fact that the ethical canon is filled with prohibitions against just this type of behavior. Moreover, breaches of honesty are punished more harshly than just about every other type of transgression, with the possible exception of misappropriating client funds. So with all of the reasons to tell the truth, why is it that lawyers so often lie?

In my view, the reason is simple – lying works; at least in the short-term. In the thousands of cases mentioned above, I have yet to come across the situation where a lawyer told a lie, despite the fact that he thought the truth would serve him better. In other words, when lawyers lie, it is because they think that the truth will not serve their immediate interests.

They lie in their marketing because they think that the truth will not bring in clients. They lie to cover mistakes because they think that the truth will subject them to lawsuits and disciplinary action. They lie to the court because they think the truth will sink their case. They lie to friends to earn their approval. They lie to spouses to avoid their disapproval. And so on and so on. Yet, as a wise person once said, “There may be a thousand reasons for dishonesty, but not a single excuse.” And given the long-term price for dishonesty, it simply isn’t worth it.

The purpose of this presentation is to demonstrate all of the disciplinary pitfalls that await the dishonest in an effort to “tip the scales” in favor of honesty. Whenever we are tempted to tell “just a little fib,” we will do well to remember that trying to be a little dishonesty is about as foolhardy as trying to be a little bit pregnant. Under the canon of ethics that we have all sworn to uphold, there is simply no middle ground.

HONESTY TO PROSPECTIVE CLIENTS

Even before the lawyer-client relationship is officially formed, lawyers have an obligation to be honest with clients in communicating about their services.

Rule 7.1 Communications Concerning a Lawyer’s Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

1 The purpose of these handout materials is not to be a step-by-step walk through of the live webinar presentation, but rather to serve as supplemental material to aid the attorney in a more thorough understanding of the principles discussed therein.
Obviously, a lawyer must avoid outright falsehoods, such as falsely claiming that they graduated from a prestigious law school or misstating their years of experience. However, the unusual aspect of this rule is that it also punishes misleading omissions. This is contrary to every instinct displayed in modern marketing. Marketers don’t attempt to present a balanced view of their product or service in light of all of the competing alternatives in the marketplace. They accentuate (if not outright exaggerate) the positives and omit mention of the negatives. At best, they communicate selected facts to prospective buyers. But as lawyers, we are required to communicate the truth.

“A fact is the absence of contradiction, but the truth is the presence of coherence.” – Dr. Martin Luther King, Jr.

In his usual eloquent manner, Dr. King summed it up perfectly. Rule 7.1 (among other ethics rules) requires lawyers to communicate the presence of coherence. So to illustrate, let’s assume that a newly admitted lawyer starts her own practice and is approached on her first day by someone with a plausible personal injury claim. Let’s further suppose that the lawyer being eager to land her first client says, “Ms. Client, I’m more than happy to take your case and just so that you’ll have confidence in my abilities, you should know that I’ve never lost a case.”

In fairness to the lawyer, this is a factual statement. It contains the absence of contradiction. However, it fails to provide the presence of coherence because the truth is that this lawyer has never tried a case. This omitted information is important for the client to make an informed decision. For this reason, lawyers are required to provide all relevant information when communicating about their services.

In fact, when communicating about their expertise and qualifications, lawyers are subject to an even more exacting standard.

**Rule 7.4 Communication of Fields of Practice and Specialization**

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

In an age of self-proclaimed experts, lawyers must actually substantiate their expertise, particularly with regards to be certified specialists. Not only must the lawyer identify the certifying body, but that body must be approved by the bar association or other controlling body.²

Also, lawyers have an affirmative duty to avoid any possible confusion about the size and sophistication of their law firms. As a general rule, clients are more trusting of larger and more established organizations. To overcome the hesitancy to hire “one-man shops,” other business professionals will often use misleading names like “John Doe & Company,” “Janet Smith Group,” etc. Lawyers are specifically prohibited from employing this tactic.

**Rule 7.5 Firm Names And Letterheads**

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

As a result, a lawyer may not hold himself out as “John Doe & Associates,” unless he employs other attorneys in his law practice. Even if he employs a receptionist, legal assistant and paralegal, he can’t claim them as “associates” because the term is commonly understood to mean junior lawyers. Likewise, a lawyer can’t imply a partnership where the professional relationship only extends to the sharing of office space and support staff.

**HONESTY TO CLIENTS**

The most common complaint from clients is that their lawyers don’t call them back. This is despite the fact that our ethics canon has a rule directing lawyers to do just that.

**Rule 1.4 Communication**

(a) A lawyer shall:

² In some states where the bar does not approve certifying bodies, the lawyer must specifically state that the certifying board has not been approved by the state bar.
(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In my experience reading disciplinary reports from across the country, I can’t think of a single instance in which a lawyer obtained a tremendous result for the client, but refused to take that client’s call for the next several months. That simply doesn’t happen. When lawyers get good results, they usually call the client immediately to relay the news. The challenge occurs when the lawyer has not obtained a good result, particularly if the lawyer is in any way culpable for that result.

That being said, the obligation to “keep the client reasonably informed about the status of the matter” remains. It is in these situations where lawyers will avoid clients altogether or failing that, resort to giving facts in lieu of the truth. Or perhaps, the lawyer may attempt to obscure the “ugly” truth with beautiful Latin prose in the form of a “memo to file.” Yet, Rule 1.5(b) is quite clear – a matter should be explained “to the extent reasonably necessary to permit the client to make informed decisions” (i.e. in language the client can easily understand).

As for “promptly replying to reasonable requests for information,” there can be a legitimate difference of opinion between the lawyer and client about what constitutes “promptly.” Lawyers can minimize these conflicts by heeding the ABA commentary to Rule 1.4:

[4] A lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer’s staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

The most salient advice here is to acknowledge client communications, even if you can’t immediately provide a response. This is particularly true in the age of e-mails,
texts and instant messages. It’s also important to implement some type of response system that will prevent important client e-mails from being buried under the avalanche of junk mail. After all, the fact that you “really meant to return that e-mail” won’t serve as a valid defense at a disciplinary hearing.

HONESTY TO THE COURT

At its root, our adversarial system of litigation is a quest for truth. For that reason, any behavior that is meant to deceive or mislead a judge or jury is not only a violation of the ethics rule, but a breach of the trust that has been bestowed upon lawyers as “officers of the court.”

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(a)(1) is not only a prohibition against making false statements, but it creates an affirmative duty to correct past false statements, or even statements that were true at the time, but are no longer true as a result of changed circumstances. This duty is sometimes overlooked by lawyers and creates unexpected ethics difficulties for even the most honest lawyer. For example, let’s suppose that a lawyer receives a continuance in the current matter because of a conflicting schedule involving another pending matter. If in the interim that conflicting matter is resolved, the lawyer should inform the court about that change in circumstances.

Rule 3.3(a)(2) is not altogether intuitive provision given the adversarial nature of our legal system. Just as a matter of principle, it would seem that a lawyer should not be required to do opposing counsel’s job for him by pointing out case law that is in opposition to her client’s position. Yet, the ABA commentary is quite clear:

“[4] ... A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities.... The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.”

We should be perfectly clear that it’s possible to avoid a “disinterested exposition of the law” and still present a truthful summary of existing relevant law. It is perfectly acceptable to argue that the facts of your particular case distinguish it from a case that appears to be in opposition to your client’s position. However, it is not acceptable to intentionally omit that case from your pleadings in the hope that opposing counsel won’t cite it. And it certainly isn’t permissible to cite that case, and then attempt to mislead the court about the actual holding through the spurious use of ellipsis in quoting from the written decision in that case.

And finally, a lawyer may not offer evidence that she knows is false, even if the client insists upon introducing this evidence. This includes testimony from witnesses. If the lawyer knows that the witness intends to offer false testimony, she can refuse to call that witness. Furthermore, if the witness testifies and offers false testimony, the lawyer has an affirmative duty to disclose that fact to the tribunal. In fact, if the lawyer only later learns that the testimony was false, she still has the duty to inform the court. This duty even supersedes the lawyer’s duty to preserve confidential client information.

HONESTY TO THIRD AND OPPOSING PARTIES

HONESTY TO OPPOSING AND THIRD PARTIES

In negotiations and litigation, knowledge is power. This creates an incentive for some lawyers to withhold information or attempt to mislead opposing and third parties. Rule 4.1 is the clearest prohibition on this kind of conduct.

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3 Notwithstanding, a lawyer may not refuse to allow a criminal defendant to testify at trial.
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.

While the language of Rule 4.1(a) is straight forward, there is a question as to what statements are considered “fact” and which of a lawyer’s statements are considered “opinion.” The commentary provides the following guidance:

[2] 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.

In short, a lawyer’s comments will not be taken as statements of fact if they would fall under the category of “puffing” or posturing. For instance, a lawyer’s prediction that the judge will likely grant him summary judgment and therefore, the other party should consider settling right now should not be taken as a statement of material fact. It is simply part of the posturing that takes place in most negotiations.

As for Rule 4.1(b), it creates an affirmative action for the lawyer to speak up to prevent harm to a third person if the lawyer’s silence would work to add the client in inflicting physical or financial harm on others. In short, this is the legal ethics equivalent of “see something, say something.”

Furthermore, lawyers have an affirmative action to insure that third parties are not confused about the lawyer’s role in the matter. Needless to say, there might be some witnesses who would be more cooperative if they were approached by someone other than, say, a prosecutor or a personal injury lawyer. Yet, in approaching third parties, lawyers must not only avoid misrepresentations, but they must make sure that the person understands the lawyer’s role and correct any misunderstanding that does occur.

Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to
correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Another affirmative duty to inform opposing or third parties occurs when the lawyer is inadvertently sent information that was intended for someone else. In that case, the lawyer is obligated to inform the sender of this error.

**Rule 4.4   Respect For Rights Of Third Persons**

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

And finally with regards to not hiding information, lawyers are prohibited from encouraging or aiding others in hiding or destroying relevant evidence. Needless to say, if the purpose of the adversarial system is to come to the truth, then that process is impeded when an officer of the court is acting to limit the discovery of key facts.

**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.

HONESTY TO DISCIPLINARY AUTHORITIES

Honesty is perhaps no more important than when dealing with disciplinary authorities. I contend that the biggest determining factor of any sanction is the candor with which the lawyer responds to the disciplinary inquiry. The lawyer who lies, obfuscates, fails to return calls, etc. invariably receives a more severe sanction than the lawyer who is forthright, contrite and offers to make restitution. For that reason alone, Rule 8.1 is a critical rule for lawyers to observe.

Rule 8.1 Bar Admission And Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

It should be noted that the obligation of truthful also applies to statements made during the admission process. And while most lawyers would consider that to be “water under the bridge,” it’s important to point out that disciplinary authorities can, and do, take action for false statements made by a lawyer on his bar application. In fact, there doesn’t appear to be any statute of limitations on such actions and as a result, lawyers have been sanctioned for false statements made decades in the past. Also, for this purpose, statements that omit relevant information are also treated as “false” statements.

Finally, lawyers must be mindful that, in most jurisdictions, they have an obligation to report any current misconduct to the relevant licensing authority, such as arrests or convictions. Likewise, most lawyers have an obligation to report the misconduct of other lawyers.

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that
lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

And it should be noted that lawyers are not only obligated to report the misconduct of opposing counsel, but also, the misconduct of colleagues, law partners and even family members. In fact, lawyers have been disciplined for failing to report the misconduct of their supervising attorney. And in a few cases, the duty to report misconduct has even superseded the duty to serve the best interest of the client.  

**HONESTY TO EVERYONE**

Perhaps, the most surprising aspect of the lawyer’s obligation of honesty is that it extends beyond the practice of law. Now, obviously, criminal acts of fraud, perjury, and the like constitute lawyer misconduct, even if the crimes occurred outside the practice of law. Officers of the court must be expected to uphold the law themselves. However, it is not so obvious that non-criminal acts of dishonesty would constitute professional misconduct, but they do.

**Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(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;

As a result of this Rule 8.4(c), lawyers have been disciplined for acts of dishonesty that seem, at first blush, to have nothing to do with the practice of law. For instance, a New York lawyer was suspended for one-year for creating a fake profile on lesbian chat site using his friend’s personal information. While quite disturbing, this behavior was in no way tied to the lawyer’s legal practice. In fact, it was not even contended that he had used his office computer for this “chat” sessions.

However, at least, the New York State Bar seems to agree with my original contention – you can’t be a little bit dishonest any more than you can be a little bit pregnant. And therefore, this kind of dishonesty was actionable as it would likely lead to dishonesty in the practice of law as well. And that is the overall lesson that we should

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4 An Illinois attorney was suspended for one year for failing to report the client’s former lawyer for misappropriating client funds. In his defense, Himmel explained that he had opted not to report the other lawyer to increase the chance that his client would receive restitution from the prior lawyer. However, the court reasoned that the obligation to the protect the public from this lawyer’s pattern and practice of misappropriating client funds outweighed his duty to this one particular client.

5 2013 NY Slip Op 05320 [109 AD3d 351].
take away from this program. The only way to ensure that we will stay on the right side of the ethical lines with regards to honesty is to result to, at all times, tell the truth, the whole truth and nothing but the truth.