

# LAWYERS AND TRUTH-TELLING

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Critics of the adversarial system's relationship with truth fall roughly into two groups. The first group, exemplified by John Langbein, seeks reform of our trial and pretrial procedures. These critics would give judges greater independent responsibility for truth-seeking.<sup>1</sup> The second group, exemplified by Judge Marvin Frankel, would give lawyers greater responsibility for truth-telling.<sup>2</sup> Although the approaches of these two groups can be combined, Langbein's approach seems more promising than Frankel's. High-minded, ethical pronouncements cannot transform adversarial tigers into public-spirited pussycats.<sup>3</sup> Both the market for legal services and the lawyer's sense of professional obligation press her not to reveal truths that will prove harmful to a client.<sup>4</sup>

The dilemma posed by a client who proposes to present false testimony illustrates the difficulties of assigning the primary responsibility for truth-telling to lawyers. Under both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility, lawyers have a clear obligation not to present such testimony.<sup>5</sup> According to the commentary to these codes, the difficult questions arise when a client insists on testifying falsely and the

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1. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824-25 (1985); *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 206-08 (1979).

2. See, e.g., MARVIN E. FRANKEL, *PARTISAN JUSTICE* 64, 79, 81-83 (1980); *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1057-59 (1975); *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 51-52 (1982).

3. The animal imagery is Arthur Miller's. See Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 15 (1984).

4. The rhetoric of the adversary system and the rhetoric of the market have much in common. Both insist that a person can do good by pursuing selfish ends. The invisible hand will yield truth in the courtroom, just as it produces the most efficient distribution of goods and services in the marketplace. But things are obviously not that simple. See Albert W. Alshuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 318 (1998).

5. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (2001); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(4) (1981).

lawyer is unable to withdraw.<sup>6</sup> Should the lawyer blow the whistle, refuse to call the client to the stand, permit the client to offer false testimony in narrative form, or something else? Much ink has been devoted to answering these questions,<sup>7</sup> but bar committees and legal academics seem to worry about them more than most trial lawyers do.

Many trial lawyers apparently have the same view as a public defender who spoke to one of my classes. When a student asked about the rule forbidding a lawyer to elicit false testimony from a client, this lawyer insisted that there was no such rule. "No," he stated, "there isn't any rule saying I can't put my client on the stand when I know he's lying. The only rule is that I can't put my client on the stand when I *know* that I know he's lying. I've had many cases in which I knew my client was lying, but I've never had a case in which I *knew* that I knew he was lying."

Some lawyers say they never know what the truth is—not even when a client has confessed his guilt. Even more reject the conventional wisdom that a lawyer should describe the attorney-client privilege to a client and press the client hard for the truth to avoid being surprised at trial.<sup>8</sup> These lawyers don't *want* their clients to level with them. Not knowing the truth makes it easier to avoid the ethical issue.

Even the lawyer's obligation not to abet perjury thus seems to be of limited efficacy, but I do not dismiss altogether Marvin Frankel's proposal to give lawyers more responsibility for truth-telling. At least some progress can be made by revising ethical codes. Many lawyers currently endorse the view of Lord Brougham:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other

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6. See MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 4-10 (2001).

7. See, e.g., Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121 (1985); Richard H. Underwood, *The Professional and the Liar*, 87 KY. L.J. 919, 920-21 (1998-99).

8. Standard 4-3.2 of the ABA Standards for Criminal Justice provides:

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

ABA STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.2 (3d ed. 1993).

persons, and among them, to himself, is his first and only duty.<sup>9</sup>

These lawyers translate the duty of zealous representation to mean that everything not forbidden is required. If an action will benefit a client and is not forbidden by the rules of professional conduct or other legal rules, the lawyer must take that action even if it is misleading or deceptive.<sup>10</sup>

Professional codes should be revised to deprive lawyers of this unfortunate argument. The codes should state that a lawyer's duty of faithful representation does not justify his or her departure from ordinary norms of fair dealing.<sup>11</sup> In this respect, I would distinguish the duty of faithful representation from the duty to preserve a client's confidences, which does sometimes require a lawyer to depart from ordinary principles of fair dealing.<sup>12</sup> The proposed declaration would not provide an enforceable standard of professional discipline. Its only function would be to declare the "Brougham defense" of trickery, overreaching, and discourtesy out of bounds.

The law should impose affirmative truth-telling obligations on lawyers only when it also imposes affirmative truth-telling obligations on their clients, and the first question for a reformer who proposes a new truth-telling responsibility for lawyers should be whether the responsibility might be better assigned to clients instead. For example, should litigants, other than criminal defendants, be obligated to disclose material evidence favorable to the other side—the same sort of obligation *Brady v. Maryland*<sup>13</sup> imposes on prosecutors?<sup>14</sup> Certainly the world would be a better place if litigants could be persuaded to disclose this evidence. The only objection to requiring them to disclose adverse information is practical: how much virtue

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9. 2 THE TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale, ed., London, Albion Press 1821), quoted in GERALD F. UELMEN, LESSONS FROM THE TRIAL: THE PEOPLE V. O. J. SIMPSON 3 (1996).

10. See, e.g., ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996) ("What a defense attorney 'may' do, he *must* do, if it is necessary to defend his client. A zealous defense attorney has a professional obligation to take every legal and ethically permissible step that will serve the client's best interest—even if the attorney finds the step personally distasteful.").

11. See Alschuler, *supra* note 4, at 318-19.

12. See *id.* at 319 n.118.

13. 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

14. *Brady v. Maryland* imposes obligations on the prosecutor and her client—the public or the government simultaneously. See *id.* at 87-88; MODEL CODE OF PROF'L. RESPONSIBILITY EC 7-13 (1981) (noting that "during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client?").

can the legal system appropriately require in light of the temptations not to comply, the difficulties of enforcement, and the inequalities evasion would produce?

Once this issue of practicality is resolved, the primary obligation of truth-telling ought to be placed on someone who usually can tell the truth without any conflict of loyalty and without betraying a confidence—the litigant himself. The lawyer's obligation then would become the familiar derivative one of what she should do to ensure a client's compliance with his legal obligations and how she should respond to the client's default.<sup>15</sup>

Telling the truth to tribunals and third parties when doing so might prove harmful to a lawyer's clients is probably the most controversial of the duties that fall under the heading "The Lawyer's Obligation to the Truth." At least two other obligations also belong under this heading: the duty to tell the truth *to* clients even when doing so may be costly and the duty to speak truth to power *on behalf* of clients. Historically, clients mostly thought of their lawyers as the people who said no. Lawyers traditionally erred on the side of caution when counseling clients, and their advice that legal risks were not worth taking could rarely be proven wrong.

"No," however, is rarely the advice clients want to hear. As competition among lawyers intensified, lawyers grew more likely to resolve doubts about a course of action in their clients' favor and to say "yes."<sup>16</sup> Especially when the advice of counsel might help protect clients from liability, lawyers usually knew what advice the clients preferred.<sup>17</sup>

In addition, "eat what you kill" compensation systems may have aggravated the temptation to give client-pleasing advice. These systems have made individual lawyers more dependent on particular

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15. See Albert W. Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67, 77-78 (1982).

16. Ending the historic cartelization of the legal profession was probably worthwhile, but the organized bar's claim that some restrictions on competition encouraged and facilitated professionalism was not simply a ruse or rationalization. In law as in accounting, securities brokerage, and corporate management, the era of deregulation and de-cartelization has shown how competitive markets overemphasize the short run and make other-regarding behavior less likely.

17. For example, Max Hendrick III, a Vinson & Elkins lawyer, may not have given Enron executives erroneous legal advice when he concluded that Sherron Watkins' memorandum concerning accounting irregularities did not require a new independent audit or other remedial measures. See Miriam Rozen & Brenda Sapino Jeffreys, *V&E's Role in Enron Debacle Probed*, TEXAS LAWYER, Jan. 21, 2002, 1 at 10. Hendrick undoubtedly realized, however, that the Enron executives would be happy with his conclusion, and this realization might have colored his advice.

clients. Unlike traditional compensation mechanisms in a firm with many clients, the new arrangement has supplied little economic insulation for professional independence and integrity.

At the heart of the lawyer's role is her obligation to speak the truth to power on behalf of clients. Why did Atticus Finch, the hero of *To Kill a Mockingbird*, do so on behalf of Tom Robinson, a black man falsely accused in Maycomb, Georgia of raping a white woman?<sup>18</sup> Finch could not save Robinson from conviction and a death sentence, and he must have known he could not. Moreover, his forthright defense of Robinson risked more than his personal popularity and comfort; it led to a murderous attack upon the lawyer's children.<sup>19</sup>

Thomas Shaffer offers this explanation:

Atticus insisted on, and lived by, telling the truth. . . . He concluded that his seeing and telling of the truth justified risk: risk to his own welfare, risk to the welfare of his children, and risk to the maintenance of civility in Maycomb—which especially valued civility . . . . Because he told the truth . . . he was able to confront the conventional, cultural untruth. . . . His confrontation was in aid of who he was, and also in aid of what his community was. . . . [N]ot telling the truth would have caused him to lose his grasp on who he was, to lose control of himself<sup>20</sup> . . . and to lose his way among the people with whom he lived.

Truth-telling is as much about a lawyer's integrity as it is about the welfare of his clients and his community.

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18. HARPER LEE, *TO KILL A MOCKINGBIRD* 231-35 (35<sup>th</sup> Anniversary ed. 1995) (1960).

19. *See id.* at 299-311.

20. Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 188-90 (1981).

