

A TALE OF TRUTH IN MODERN AMERICA

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A fellow running for sheriff in a small southern town gave a stump speech at a Fourth of July picnic. At the end, the crowd applauded and wandered away, except for one man. The candidate, seeing a potential vote, approached the man and asked whom he was planning to support. The man said, "Well, I like you okay, but you're my second choice." The candidate asked who his first choice was. The man replied, "Anyone else."

And that about describes the standing of truth in the law. It's not that we're against Mr. Truth. We often claim to like the old chap. It's just that so often, and of course for the best and most refined of reasons, we prefer anyone else.

The stated justifications for the truth so frequently occupying the runner-up position in our legal system are well known, as you would expect, since we lawyers created them. Often, for example, we hear that procedural rights must be protected.¹ Thus, as the Supreme Court held in *Dickerson v. United States*, *Miranda's* exclusionary rule,² a rule that puts the truth off-limits to the jury, carries the day³ even in a case where it is known that the defendant spoke voluntarily.

In addition, some relationships are deemed more important than finding the truth. For example, the marital privilege, a sensible enough idea most of the time, holds sway even when a marriage literally occurs as a pit stop on a witness's way to a grand jury, as it did in one of my cases;⁴ the government was unable to ask even a single question of the blushing bride.

To give one last example the expanding reach of the attorney-client privilege allows clients to trust their lawyers to help them conceal

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1. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (holding that due process requires a hearing before welfare benefits may be terminated).

2. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

3. *See Dickerson v. United States*, 530 U.S. 428, 444 (2000).

4. For a similar case, see *Emo v. United States*, 777 F.2d 508, 509 (9th Cir. 1985) (*per curiam*).

whatever, in a moment of foolish candor, they might have let slip. In fact, lawyers have a duty to do just that under what are called “ethics rules.”⁵ Although these rules prescribe strict confidentiality, they do not exempt lawyers from the statutory ban on directly suborning perjury. Thus was born the mutual dance of “don’t ask, don’t tell” that has become the subsurface minuet in so many lawyers’ offices.

Some might think it odd to believe that a relationship of authentic trust can be built on a shared, if unspoken, understanding that authentic trust is impossible. And, of course, a good deal of the time there simply is no trust. Clients intuitively understand that a person who will dissemble for them might sooner or later dissemble to them. Readiness to cut a corner here and another there is not a character trait easily confined. The willingness to deceive, the temptation to call deceit by a more polite name, and the consequent ever-expanding seepage of dishonesty in the way we deal with one another, all have their own cancerous dynamic in the soul of a human being, of a profession, and of a nation.⁶ It is thus not mere circumspection that accounts for the fact that clients so often lie to their lawyers. On the contrary, clients wisely view lawyers with the suspicion we have earned by our penchant for excusing everything from willful blindness to soft-core perjury.⁷

We feel the need to ponder the question before us today because we have long since abjured the simple man’s answer to the question of what should be a lawyer’s responsibility to the truth. The simple man’s answer is, “Tell it.” But that won’t do for the more sophisticated among us, those who see, or say they see, the nuances and complexities of the world in general and the practice of law in particular. Ours are the precincts of more refined thinking. Only I suggest it is not refinement; it is equivocation impersonating refinement—or at least so I used to think. Increasingly, I think it’s just dishonesty impersonating equivocation.

The reason our system has been more or less successful at replacing vendettas with legal process is that people have been willing

5. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (1983).

6. See, e.g., Julie Bennett, *Truth or dare?*, CHI. TRIB., Sept. 5, 2001, § 6, at 1 (reporting statistics indicating that 35% of all job applications are falsified).

7. See David G. Savage, *Perjury Charges Bogus, Defense Says*, L.A. TIMES, Jan. 21, 1999, at A14 (reporting President Clinton’s attorney’s attempt to distinguish Clinton’s earlier lies about Monica Lewinsky from his allegedly perjurious testimony before the grand jury in the Paula Jones case, and noting Clinton’s reputation for shading the truth “easily and often”).

to trust it to bring them justice.⁸ But they will trust it less and less as they see the increasingly obvious decay in its ability to produce, and in its determination to insist upon producing, the truth-based outcomes without which there *is* no justice.⁹ What we see in the recent wave of business scandals¹⁰ is less an expression of uncontrolled corporate greed than the predictable legacy of that truth-trashing slogan we heard so often in the Monica Lewinsky affair: It's "time to move on."¹¹ Now we know onto what we have moved. The most prominent lawyer in the country repeatedly and indignantly lied to the public, and a virtual army of other prominent lawyers insisted that his actions "[did] not rise to the level" of anything that might require serious accountability.¹² Indeed it turns out not to have risen to the level of anything beyond a chance to roam the globe giving \$250,000 speeches.¹³ With that as prologue, what is it exactly that we thought the legal profession would be moving on to?

Years ago we heard in this country, indeed, in these very halls, "give peace a chance."¹⁴ We need to turn away from the client *über alles* ethos that grips our professional morals, from our bulging list of apologies for deceit, and from the false sophistication that poisons public trust in the system. It is an ethos that invites the vigilantism that our legal system purports to abhor. I suggest, that just for once, we give *truth* a chance.

8. For a brief overview of the truth-oriented progress of Anglo-American civil procedure from self-help to modern codes, see Hugh Evander Willis, *Anomalous Growth of the Common Law—the Anglo-American Quest for Justice*, 3 CAL. L. REV. 103, 120-21 (1915).

9. For an example of the old-fashioned view of the importance of truth in the administration of justice, see The Hon. Mr. J. McCardie, *Truth*, 75 SOLIC. J. 9 (1931).

10. See Jim Hopkins, *Congress Seeks Papers from Investment Banker, Global*, USA TODAY, Aug. 22, 2002, at B2; Edward Iwata, *Ex-Enron Insider Pleads Guilty*, USA TODAY, Aug. 22, 2002, at B1; *Shareholders Sue Martha Stewart*, USA TODAY, Aug. 22, 2002, at B1.

11. See Chris Black, *Apology is Praised, but Attack on Starr Draws Broadsides*, BOSTON GLOBE, Aug. 18, 1998, at A12 (quoting the remarks of Senator Edward M. Kennedy).

12. See Victoria Benning, *Impeachment Protest Planned*, WASH. POST, Dec. 14, 1998, at E7 (quoting Kim Gandy, executive vice president for the National Organization for Women, with regard to President Clinton's behavior).

13. See Helen Dewar, *Clinton Got \$9.2 Million as Speaker in 2001*, WASH. POST, June 15, 2002, at A6 (reporting that on more than one occasion, former President Clinton received as much as \$250,000 to give a speech).

14. See JOHN LENNON & PLASTIC ONO BAND, *GIVE PEACE A CHANCE* (Apple 1969). Note that this was also a slogan used in protest of the Vietnam War.

