



## TRUTH OR CONSEQUENCES

BY MARTIN COLE

From time to time, patterns emerge in the field of lawyer discipline. For example, in the late 1980s there was a series of public discipline cases involving lawyers who came to be referred to as “dishonest procrastinators.”<sup>1</sup> These cases involved attorneys who neglected client files and then lied to their client and/or to courts to cover up their conduct. In the late 1990s, a series of misappropriation cases led to record numbers of disbarments, and to several criminal convictions and incarcerations. As then-Director Edward Cleary wrote, “It should come as no great surprise to those familiar with the professional discipline system that the fastest way to lose your license to practice law is to misappropriate client funds.”<sup>2</sup> It was also noted that a few disbarments resulted from other acts of dishonesty such as forgery or fraud on the court.

Misappropriation of client funds still occurs infrequently and still results in disbarment.<sup>3</sup> What is reemerging, however, is that “other acts of dishonesty” category. Call it what you will: false statements or misrepresentations or lying; forging or falsifying or fabricating documents and evidence. Sometimes it takes a few years to truly see an evolving pattern, but we seem once again to be in the midst of a growing pattern of lawyer discipline cases involving attorneys lying to courts, opposing counsel and clients, or altering, forging or totally fabricating documents and other evidence.

The Minnesota Supreme Court declared 40 years ago that to be an attorney requires “loyalty to the truth without which [one] cannot be a lawyer in the real sense of the word.”<sup>4</sup> Today, however, too many lawyers seem to have a serious disrespect for the truth, except when it is convenient. As a result, some of them are paying the disciplinary consequences for their actions. This trend may be a reflection of a more widespread willingness to lie that exists in society as a whole, but it should be considered particularly inappropriate for attorneys.

### “HONESTY IS THE BEST POLICY”

The Rules of Professional Conduct do not just hope that lawyers will follow this old maxim and do the right thing. In

fact, truth is sufficiently important that the Rules contain several requirements that attorneys tell the truth. For example, Rule 4.1, Minnesota Rules of Professional Conduct, states unequivocally that “[i]n the course of representing a client a lawyer shall not knowingly make a false statement of fact or law.” Can it get any clearer? Furthermore, when Minnesota adopted the ABA’s Model Rule, it deleted the requirement that a false statement of fact must be “material” in order to be a violation of this rule.<sup>5</sup> All intentional false statements in the course of representing clients are equally reprehensible in Minnesota.

Several other rules require truth telling. Rule 3.3(a)(1) attaches the basic prohibition above to a lawyer’s obligations as an officer of the court by stating that an attorney shall not knowingly make a false statement of fact to a tribunal. The remainder of Rule 3.3 contains additional obligations of candor. Rule 3.3(a)(2) states that a lawyer shall not knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a client’s criminal or fraudulent act. Rule 3.3(a)(4) prohibits knowingly offering false evidence — which prohibition should be obvious — then also deals with the lawyer’s duty when she discovers that she unknowingly has offered false information to a tribunal. These obligations contained in Rule 3.3(a) apply even if compliance requires the attorney to reveal information otherwise protected as confidential.

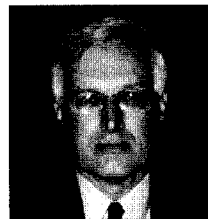
Portions of certain other rules also contain requirements of truthfulness. Rule 3.3(d) prohibits the omission of material information in *ex parte* proceedings, Rule 3.4(b) states that a lawyer shall not falsify evidence, or counsel or assist a witness to testify falsely, and Rule 8.4(c) generally prohibits dishonesty, misrepresentations, and deceitful conduct in all aspects of an attorney’s life. Even in lawyer advertising the Rules recognize the importance of honesty. Rule 7.1 prohibits a lawyer from making a false or misleading statement about the lawyer or the lawyer’s services in any advertising or marketing instrument or in any permitted direct solicitation.

The Minnesota Supreme Court, in numerous lawyer disciplinary decisions, has emphasized the importance of telling the truth as a fundamental character trait for attorneys, stating: “Attorneys are, first of all, officers of the court and owe it their highest duty. This duty imposes an obligation on all attorneys to be truthful in their dealings with both opposing counsel and the court.”<sup>6</sup> “Our legal system depends on the truthfulness of the testimony of witnesses and false testimony strikes at the very heart of the administration of justice.”<sup>7</sup> “It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” We have generally issued more serious discipline for misrepresentation.<sup>8</sup>

### RECENT DECISIONS

In the past two years, several lawyers have been publicly disciplined for various acts of “other dishonesty.” Misrepresentations to clients and others resulted in disbarment for two lawyers when combined with other serious misconduct or prior public discipline.<sup>9</sup> Two dishonest procrastinators were publicly reprimanded and placed on probation for lying to cover up their neglect.<sup>10</sup> Discipline was imposed on three attorneys for lying to a court: misrepresentations to the bankruptcy court concerning the lawyer’s fee arrangements with his clients resulted in a six-month suspension;<sup>11</sup> giving false testimony under oath as a witness also warranted a six-month suspension;<sup>12</sup> and lying to the court in the lawyer’s own dissolution and custody matter warranted a 30-day suspension.<sup>13</sup> Two lawyers were suspended for altering documents: one

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signed and notarized his client's signature on an affidavit, resulting in a stayed 30-day suspension;<sup>14</sup> the other forged the client's initials to changes made by the lawyer to a fee agreement and waiver of homestead lien document. Since it was the second incident involving this particular lawyer altering a homestead waiver, the total period of suspension for the two matters combined was 27 months.<sup>15</sup>

There are several cases "in the pipeline" that may result in public discipline by the end of this year or early in 2004. These involve matters such as failing to disclose material information to the court in an *ex parte* proceeding and photocopying a client's signature to create a false fee agreement. It is exceedingly rare that dishonest conduct results in a private disciplinary decision.

There are programs that assist the disciplinary system in uncovering lawyers who misuse their trust accounts. For example, overdrafts on lawyer trust accounts are reported to the Director's Office for possible investigation.<sup>16</sup> False statements and forged documents can be harder to detect, however. There is no magic alarm that goes off when a lawyer knowingly lies to a client, opposing party or judge, although there should be one that goes off inside the head of the offending lawyer. Vigilance, especially by the courts, to challenge and report incidents of attorneys knowingly making false statements is useful for discipline and deterrence, but ultimately it's a matter of character.

Unlike lawyers who misappropriate client funds, many of the lawyers who commit these acts of "other dishonesty" are allowed to continue or eventually are reinstated to the practice of law. Most of the ones who are reinstated never repeat their previous misconduct and successfully establish that their dishonesty was a one-time act that was completely out of character. Some use the lesson learned to alter their practices and their lives permanently for the better. For those who repeat their dishonesty, however, the discipline the second time around usually has been more severe.<sup>17</sup>

### CONCLUSION

The daily news reveals some shocking examples of individuals, including individuals of prominence, who have been willing to lie, cheat and steal their way to success, or who try to lie or obfuscate their way out of trouble once confronted. No doubt many acts of lying or falsifying go undetected, and too often such acts may appear to result in some short-term benefit for the

person willing to engage in such conduct.

The Rules of Professional Conduct prohibit lying and falsifying evidence. Lawyers willing to lie or falsify on behalf of a client or themselves may succeed in the short run and have to deal only with their conscience, but if detected, they should know that they will face serious disciplinary consequences. □

### NOTES

1. William Wernz, "The Dishonest Procrastinator," *Bench & Bar of Minnesota* (January 1990), p. 15.
2. Edward Cleary, "Deconstructing Disbarments," *Bench & Bar of Minnesota* (November/December 1998), p. 17.
3. Most significant was the disbarment of Stephen J. Rondestvedt, who was found to have misappropriated more than \$700,000 of client funds. *In re Rondestvedt*, A03-1420 (Minn. 10/09/03). <http://www.lawlibrary.state.mn.us/archive/upct/0310/ORa031420-1010.htm>
4. *In re Nilva*, 266 Minn. 576, 123 N.W.2d 803, 809 (1963).
5. The MSBA has filed a petition with the Supreme Court to adopt several changes to the Rules of Professional Conduct. The MSBA once again deleted from Rule 4.1 any requirement that a knowing false statement be material to violate the rule.
6. *In re Ruhland*, 442 N.W.2d 783, 786 (Minn. 1989).
7. *In re Salmen*, 484 N.W.2d 253, 254 (Minn. 1992).
8. *In re Ganley*, 549 N.W.2d 368, 370 (Minn. 1996).
9. *In re Westby*, 639 N.W.2d 358 (Minn. 2002); *In re Samborski*, 644 N.W.2d 402 (Minn. 2002).
10. *In re Dufresne*, 640 N.W.2d 337 (Minn. 2002); *In re Johnson*, 652 N.W.2d 703 (Minn. 2002).
11. *In re Wentzell*, 656 N.W.2d 402 (Minn. 2003).
12. *In re Kopeska*, 638 N.W.2d 196 (Minn. 2002).
13. *In re Scott*, 657 N.W.2d 567 (Minn. 2003).
14. *In re Riggs*, 664 N.W.2d 290 (Minn. 2003).
15. *In re Peterson*, 620 N.W.2d 29 (Minn. 2000); 658 N.W.2d 875 (Minn. 2003); 660 N.W.2d 419 (Minn. 2003).
16. Rule 1.15(k)-(o), *Minnesota Rules of Professional Conduct*.
17. *In re Bernard*, 374 N.W.2d 721 (Minn. 1985) (public reprimand for altering fully executed real estate document); *In re Bernard*, 534 N.W.2d 272 (Minn. 1995) (90-day suspension for again altering an executed real estate document).

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