ESSAYS

HONESTY COMES FIRST

Hon. Thomas M. Reavley*

Lawyers are required by the principles of professional conduct to be honest. They are not merely mouthpieces for hire; they are pledged to be trustworthy servants of truth and justice. All who would betray that basic principle, who wink at deceit and perjury, who sell their honor with their services — these are unworthy of the profession. We live in an age of preference for appearance over virtue, little regard for commitment, and of rampant hypocrisy; then we must tell and retell the proposition, call and call again for strengthening the bulwark of integrity.

For this writing, I raise briefly two problems aside from the character flaw of some lawyers. First, many are led astray by a false concept of what is required or justified by zealous representation of the client. Second, the public stance of the profession is undermined by patently false statements of counsel to the media in advance of publicized trials.

THE ZEALOUS ADVOCATE

It is often argued that full representation of the client justifies the use of any device to win the case, including argument to court and jury that the lawyer knows to be false. Because a defendant has a right to testify, we are told that the lawyer should protect that right even at the risk of false testimony. Only the fact-finder is supposed to safeguard against perjury. Only the judge and jury are to be concerned with truth. The glory of the adversary system is to arm

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the advocate with any weapon that may succeed.

Humbug! Balderdash!

Who will respect a profession that aspires to deceive and pretends that its system does justice by choosing the best liar?

TRIAL PUBLICITY

Why has the reputation for honesty of lawyers declined so much in recent years? My own experience of fifty years is that the reality is quite different; I find the level of integrity across the profession to have improved. If that is so, how do we explain the disparity? I suggest one factor: the public statements of lawyers about their trial claims and defenses. The blatant lies of counsel in celebrated cases have caused the public to reject as false every argument of counsel to the media about the blamelessness of the client. More cookery by professional liars, thinks the viewer. The noble legal profession, and the world's greatest legal system, suffer as a result.

The organized bar has tried unsuccessfully to control attorney speech for many years. The 1983, Rule 3.6(c) of the American Bar Association's *Model Rules of Professional Conduct* indirectly encountered Justice O'Connor's deciding vote of First Amendment vagueness against Nevada Rule 177 in *Gentile v. State Bar of Nevada*.[1] Because of Rule 3.6's similarity to Nevada Rule 177, the ABA amended Rule 3.6 in 1994, but disagreements continue.[2] The American Law Institute's Restatement of the Law Governing Lawyers in the proposed draft at section 169 only prohibits public statements that "will have a substantial likelihood of materially prejudicing a juror or influencing or intimidating a prospective witness" and statements "reasonably necessary to mitigate the impact on the lawyer's client of substantial, undue, and prejudicial publicity" initiated by others.[3] The section also requires prosecutors to refrain from statements that have a "substantial likelihood of heightening public condemnation of the accused."[4]

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1. 501 U.S. 1030, 1081–82 (1991) (O'Connor, J., concurring).

2. *See* Ronald D. Rotunda, *Dealing with the Media: Ethical, Constitutional, and Practical Parameters*, 84 ILL. B.J. 614, 617–18 (1996); Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 838 (1996).

3. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 169(1) (Tentative Draft No. 8, 1997).

4. *Id*. § 169(2).

I believe that we will accomplish no more by rule than the ALI draft suggests. Attorneys *should* stick with the record and explanation of legal procedure, honestly answering adverse publicity when necessary; but an enforceable order is probably best left to the judge of the particular case.[5] Admittedly, this leaves much to be desired to protect the reputation of the profession as well as justice, during civil as well as criminal proceedings, from dishonest publicity.[6] But I think the insistence of the members of the profession and self-correction offers the best answer we have.

Say it again: Liars do not belong in this profession. Every statement to the court, to the jury, to opposing counsel, and to the public should be reckoned by personal integrity and not by the skullduggery to prevail irrespective of the truth.

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5. *See, e.g.*, United States v. Cutler, 58 F.3d 825, 829–31 (2d Cir. 1995); *In re* Sullivan, 586 A.D.2d 440, 441 (N.Y. App. Div. 1992).

6. *See generally* Carole Gorney, *Model Rules and Litigation Journalism: Enough or Enough is Enough?*, N.Y. ST. B.J., Dec. 1995, at 6 (concluding that the 1994 amendments to the ABA *Model Rules of Professional Conduct* fail to address a number of shortcomings in their attempt to control trial publicity).