THE TRUTH IS RARELY PURE AND NEVER SIMPLE

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The title of this article is from Oscar Wilde's play, The Importance of Being Earnest (1895).

Wilde's immutable proposition is of great importance to those of us engaged in the adversary system. We are concerned about ethical advocacy, witness "coaching," cross-examination, the limits of human memory and perception, and, as the oath puts it, "the truth, the whole truth, and nothing but the truth."

I've ruminated on lawyers and truth during my pandemic-induced home confinement.

When stuck in one's basement—spared commuting, meetings, and court appearances, and other time-consuming inefficiencies of the way things used to be—one has time for—and to write about—ruminations.

1.

The lawyer's obligation to the truth is addressed in the American Bar Association Model Rules of Professional Conduct (MRPC), the similar Michigan RPC, and other "ethics" codes and rules for lawyers.

Truth is an important consideration in meeting the obligations addressed by MRPC 1.6,3.3, 3.4, 4.1, and 8.4 and the comments accompanying those rules. I expect you will reread the rules and comments soon, but for now I summarize: a lawyer is obligated to the truth—within limits.

2.

The rules provide guidance, but things aren't always pure and simple. The rules meaningfully distinguish between what the lawyer knows about the truth and what the lawyer believes or suspects about the truth.

Sometimes the ethical lawyer is obligated to present as true evidence that the lawyer suspects is not true, or at least is not the whole truth. Sometimes client interests obligate the ethical lawyer to withhold, or distort, pertinent truths.

Of course, the ethical lawyer cannot properly "engage in conduct involving dishonesty fraud, deceit, or misrepresentation." MRPC 8.4(c). Nor can the ethical lawyer "knowingly assist or induce another to do so, or do so through the acts of another." MRPC 8.4(a).

But sometimes, to be ethical—to provide responsible, confidential, and zealous representation—the lawyer must misdirect, or mislead, or put a thumb on one side of the scale, or put the emphasis on the wrong syllable, or otherwise deviate from what is—or what the lawyer suspects, or even knows is—the truth, the whole truth, and nothing but the truth.

Take cross-examination, for example, discussed next.

3.

Professor Stephen L. Carter clinically assesses cross-examination, the centerpiece of the art and science of trial advocacy.

> In cross-examination, a lawyer will try to make even a witness he knows to be telling the truth appear to be at best confused and at worst a liar. In a system that relies on the adversity of the parties to discover the truth, a lawyer can do nothing else. Still, this conveying of a false impression—trying, in effect, to fool the jury into disbelieving a truthful witness—is nothing but an expedient lie.[1]

Professor Alan Dershowitz writes that "when you become a lawyer, you have to define good differently than you did before." As a lawyer, Dershowitz writes, "you're someone else's representative," "acting on their behalf," as "their spokesperson." As a lawyer, "doing good" often means "doing good specifically for your client, not for the world at large, and certainly not for yourself."[2]

That is why, Dershowitz writes, the ethical lawyer can defend a client accused of a crime when the lawyer suspects that the innocence-professing client is not telling the truth, and even when the client tells the lawyer—in confidence—that the client is guilty.

The lawyer serves the client, and simultaneously the adversary system, even while withholding or distorting the truth by, as Carter describes, making a truthful witness appear to be confused or lying. This obligation to the client is, Dershowitz writes, the ethical lawyer's "role responsibility."[3]

4.

Barrister and creator of "Rumpole of the Bailey," the late Sir John Mortimer, wrote that the defense advocate's responsibility in a criminal case "is to put the case for the defence as effectively and clearly" as would the client if the client "had an advocate's skills."

The advocate's "belief or disbelief in the truth" of the client's story is "irrelevant." A barrister can't ethically call the client "to tell a story" the barrister knows to be untrue, but if the client "says he didn't do it," the barrister must present the client's story. The barrister is "a spokesman in an argument which is directed not at uncovering the truth, but at deciding whether or not the prosecution has proved guilt."

The barrister's ethical responsibility, Mortimer observes, sometimes requires "the suspension of disbelief."[4]

This ethical responsibility also governs labor and employment lawyers called on, say, to defend the accused at discharge arbitrations, to represent managers denying discriminatory motives, or to disclaim collectively bargained lifetime retiree healthcare promises.

So, it seems, ethical advocates may be obligated to conceal or distort the truth and to employ the "expedient lie." This is ethical because it serves the adversary system which, ultimately, we believe, serves the truth, as discussed next.

5.

A foundational premise of our adversary system is that the truth is most likely to emerge from the ordered clash of partisan interests, zealously represented.

The lawyer-client privilege allows candid communications, cloaked in confidentiality, shielded from adversaries, judges, jurors, and everyone else. This confidentiality, we believe, serves the adversary system which, we trust, will lead to truth and justice—or at least to fair adjudication and final resolution.

Cross-examination has the same salutary end. Bentham called cross-examination "a security for the correctness and completeness of testimony." The epigraph to Wellman's The Art of Cross-Examination, first published in 1903, calls cross-examination "the surest test of truth and a better security than the oath." Wigmore famously called cross-examination "the greatest engine ever invented for the discovery of truth." You can look it up.

So, our system trusts—or hopes—as Shakespeare put it, that "in the end truth will out."

Is this so? Is the best road to truth paved with concealment, distortion, false impressions, expedient lies, and adversary self-interest? To quote Tevye from Fiddler on the Roof: "I'll tell you…I don't know."

As they say in law school, discuss and decide. While doing so, consider—borrowing from Churchill on democracy—that our adversary system might be the "the worst" ever—"except for all" the others.[5]

6.

Dershowitz offers more perspective:

> Despite the bad rap that lawyers get for being amoral, even immoral, the reality is that no profession obsesses more about morality and ethics than the legal profession. We draft codes, we teach classes, we require examination, we have ethics committees and we actually discipline and disbar—though not enough—for failure to comply with these generally high standards.

Ethical lawyers must "resolve all ethical doubts" in their clients' favor. Lawyers do not have a "license to lie," Dershowitz affirms, but "do have a license to keep deep dark secrets" and "advocate outcomes" which the lawyers know are "objectively unjust but subjectively beneficial" to their clients.[6]

An ethical lawyer must sometimes struggle to resolve tensions between the lawyer's responsibilities as the client's advocate and, as the MRPC Preamble puts it, as "an officer of the legal system and a public citizen having special responsibility for the quality of justice."

It ain't always easy. Professors Carter and Dershowitz show that the truth is rarely pure and never simple. Mortimer—who kept his "disbelief" hanging in the Old Bailey robing room for years—observed that "life as a mouthpiece for more or less convincing stories can, in the end, prove unsatisfactory."[7]

Dershowitz writes that if you are "a decent and thinking person, you will never grow entirely comfortable with some of the tactics you will be required to employ as an effective and ethical lawyer."[8]

7.

Twenty-twenty marked my first pandemic, but over the decades I have ruminated, written, talked to lawyers, and taught and tested law students, about the lawyer's obligation to the truth.[9]

Here are my conclusions, to date: (i) the truth is rarely pure and never simple; (ii) ethical lawyers must ruminate, and bring care, thought, zeal, and humility to their advocacy work; and (iii) ethical lawyers inevitably will suffer periodic decision-making difficulties, doubts, and disappointments.

Caveat litigator: If you want distance from difficult decisions, doubts, and disappointments, you can maybe switch to estate planning.

Notes

1 1 Stephen L. Carter, Integrity (Harper Perennial, 1996) at 112. As the Yiddish proverb teaches, "a half truth is a whole lie."

2 Alan Dershowitz, Letters to a Young Lawyer (Basic Books, 2001) at 41.

3 Id. at 44-45.

4 Sir John Mortimer, Where There's a Will (Viking, 2003), chapter 11, "Lying," at 85.

5 For comparison, examine the European civil law system, which, to my admittedly casual eye, is marred by rigidity, technicality, bureaucracy, and abstraction. To again borrow from Churchill, "in this world of sin and woe," no one "pretends that" the American adversary system and its elected and appointed judicial officers are "perfect or all-wise," but for all their flaws, they may be better than the alternatives.

6 Dershowitz, supra, at 151-152, 158.

7 Mortimer, supra, at 85.

8 Dershowitz, supra, at 160. Discomfort may derive in part from popular disapproval, or misunderstanding, of the lawyer's role in the adversary system. Carter writes that while lawyers "may share a vision of integrity," the "lies we are forced to tell, and the convoluted arguments we must offer to justify them, virtually ensure that lawyers will be not only disliked but distrusted." Carter, supra, at 120. Some dislike lawyers for their perceived "quiddities,"

"quillities," and "tricks"—arguments, fine distinctions, and, well, tricks. W. Shakespeare, Hamlet (1603), Act V, Scene 1.

9 See—or maybe buy—my book Taking and Defending Depositions—Second Edition (ALI CLE 2017). Chapter 7, on which this article draws, is titled "Truth, Memory, and the Ethical Boundaries of 'Coaching.'" See also my essay titled "The Lawyer's Obligation to the Truth in Litigation, Negotiation, and Mediation," collected in Israel and Goldman, Opinions—Essays on Lawyering, Litigation and Arbitration, the Placebo Effect, Chutzpah, and Related Matters (Amazon Createspace 2016) at 125. My views on lawyers, truth, and advocacy ethics have appeared in various manifestations in Lawnotes, ICLE and law school materials, and elsewhere, dating back decades. I became interested in these topics early on, when I worked as a public defender and taught criminal appellate practice. Like Dershowitz and Mortimer, I was frequently asked how I could represent people—i.e., "crooks"—who I knew were guilty. When you do criminal appeals, all your clients are convicted criminals. My answer, of course, as Dershowitz later put it, is that it was my "role responsibility" to serve my clients and, simultaneously, the integrity of the adversary system.