First, Tell No Lies

A Hippocratic Oath For Lawyers?

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This is a terse outline summarizing some of the slides shown and the Model Rules of Professional Conduct discussed during Richard Dooling's presentation on truthfulness for lawyers and the search for a Hippocratic Oath for lawyers, first given at the Lincoln Bar Association CLE on 8 November 2018.

The presentation explores the rules that prohibit lawyerly untruths to clients, courts, and third parties. It will also ask if there are situations where a lawyer MUST speak to prevent a misunderstanding or to avoid assisting a criminal or fraudulent act by a client. In passing, it will explore the tension between duties to disclose and client confidentiality.

First, Do No Harm

Despite popular misconceptions to the contrary, the phrase "First do no harm" (Latin: *Primum non nocere*) does not appear in the original Hippocratic oath. But the original oath does contain the following sentence:

Also I will, according to my ability and judgment,
prescribe a regimen for the health of the sick;
but I will utterly reject harm and mischief.

Okay, if not the same idea, it's at least related, but it's also wordy, and maybe that's why "First, do no harm" has taken its place over time: it provides a nice four-word guidepost to steer by for any fiduciary.

Another sentence in the original Hippocratic oath, might be even more important for lawyers than for physicians:

I will willingly refrain from doing any injury or wrong from falsehood.

Who knew that physicians needed an oath to keep them honest while treating their patients? The sentiment expressed in this sentence from the original Hippocratic Oath is quite close to the same concern expressed in various lawyer codes dating all the way back to the 13th Century, which I propose to render as: First, Tell No Lies.

English Parliament, The Lawyer's Oath (1402)

Many variations of this oath are found in the history books dating to 1246 and on down to the present day. This formulation was found in the Book of Precedents in the Court of the Exchequer, and was called: "The Oath of the Attorneys in the Office of Pleas":

You shall do no Falsehood
nor consent to any to be done
in the Office of Pleas of this Court
wherein you are admitted an attorney.

And if you shall know of any to be done
you shall give Knowledge thereof to the Lord Chief Baron
or other his Brethren that it may be reformed.

So at least two of the modern ABA Model Rules of Professional Conduct (the Model Rules) had their origins in ancient lawyer codes.

First, Tell No Lies

Let's propose this, then, as a possible candidate for a modern Lawyer's Oath. It sounds deceptively easy and the gist of it is already expressed in several Model Rules.

Model Rule 4.1: Truthfulness In Statements To Others

Model Rule 4.1 contains two parts: (a) and (b). Part (a) is easy and straightforward:

> In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

In plain English: Don't tell lies. And the comments elaborate by warning that:

> A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

Also discussed, what is a statement of fact? Along with a warning that lawyers should "be mindful of their obligations … to avoid criminal and tortious misrepresentation." The comments also offer a safe harbor of sorts for puffery during settlement negotiations:

Comment 2 clarifies an exception to that rule's prohibition on false statements, to wit:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category …

ABA Formal Opinion 06-439 agrees that such statements do not normally count as false statements of material fact and instead constitute "puffing."

However, FACTUAL STATEMENTS, like "My client sent me an email and told me just yesterday that she would never settle this case for less than $100,000." Such statements are far more problematic. Now the lawyer is outright lying. About facts. Not just puffing about the supposed worth of claims.

In the words of ABA Formal Opinion 06-439:

> Whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements 'of fact,' are not conveyed in language that converts them, even inadvertently, into false factual representations.

Liars don't make good negotiators, because nobody trusts them to keep their word. Many fine lawyers see no need for posturing or puffery and prefer dealing squarely with all concerned. And even a warlike, scorched-earth, take-no-prisoners litigator settles 90% of her cases. Yes, it's nice to have a formidable reputation for winning in court, just in case negotiations break down, but once into settlement terms, doesn't it make sense to speak truth and try to reach a fair resolution?

Deception and scheming are not assets when making deals. Many great lawyers never lie or even fudge the truth. Why? Why not instead develop a reputation for speaking the truth and being a person of your word?

Your CREDIBILITY!

> Regard your good name as the richest jewel. For credit is like fire; when once you have kindled it you may easily preserve it, but if you once extinguish it, you will find it an arduous task to rekindle it again.
>
> —Socrates

So far so good, and pretty easy, right? Just don't lie, and be careful with hyperbole and exaggerations during negotiations.

As for dishonest conduct other than false statements of fact and misrepresentations, we have a separate Model Rule.

Model Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Again straightforward and most lawyers know what sorts of behaviors are prohibited by the terms of Model Rule 8.4.

Candor Toward The Tribunal

Model Rule 3.3(a)

A lawyer shall not knowingly:

1. make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

2. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

Model Rule 3.3(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Candor to the TRIBUNAL (Rule 3.3) versus Candor to THIRD PERSONS (Rule 4.1) "Known to the lawyer" (actual knowledge, NOT a reasonable person or reasonable lawyer "should have known" standard).

Model Rule 1.0 Terminology

"Knowingly," "Known," or "Knows"

- "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

What is a tribunal?

- Rule 1.0 (m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.
- A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Model Rule 3.9: Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comments:

> This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument.

> It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners.
>
> Representation in such matters is governed by Rules 4.1 through 4.4.

Complications

I'll introduce the hard part with the following quote:

> The cruelest lies are often told in silence. A man may have sat in a room for hours and not opened his mouth, and yet come out of that room a disloyal friend or a vile calumniator.
>
> –Robert Louis Stevenson

What about lies told in silence? Are their circumstances where silence amounts to deception? Of course, but sometimes lawyers are bound to silence, because they owe an ethical duty of confidentiality to their clients. What about circumstances where silence amounts to deception, but to provide the information needed to dispel the falsehood would violate the lawyer's duty of confidentiality?

Model Rule 4.1(b)

The second part of Rule 4.1 (Truthfulness In Statements To Others) provides an attempted answer:

> In the course of representing a client a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 (Confidential Information).

Under the Model Rules, "fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. Rule 1.0(d). Let's peruse the Restatement of Torts to get an idea of what the Model Rules are after here.

Rest. 2nd Torts § 551(2)(c) Liability for Nondisclosure

- Restatement (Second) of Torts § 551(2)(c) creates fraud liability for non-disclosure of material facts that induce justifiable reliance, if an actor fails to disclose subsequently acquired information that the actor "knows will make untrue or misleading a previous representation that when made was true or believed to be so."

Rest. 2nd Torts § 552(2) Misrepresentation

- A false representation;
- Concerning a presently existing material fact;
- Which the representor KNEW to be false or was made recklessly (fraud), or
- which was made negligently;
- For the purpose of inducing another to act;
- The other party reasonably relied on it;
- To his injury or damage.

If the misrepresentation is intentional or reckless, third parties may recover even if not in privity with the lawyer, as long as they reasonably relied on a misrepresentation of material fact. It used to be that privity *was* required for a claim of negligent misrepresentation to stand, but this rule has gradually been eroded and replaced by the Restatement 2nd of Torts 552(2).

More Moving Parts

Model Rule 4.1(b) seems to require that a lawyer may not remain silent and must disclose material facts if keeping silent means assisting a criminal or fraudulent act by a client, but the last clause offers a huge exception:

> Unless disclosure is prohibited by Rule 1.6 (Confidential Information).

Model Rule 4.1 then incorporates by reference the entirety of Model Rule 1.6 (Confidential Information), because Model Rule 4.1(b) does not require any disclosure that would violate the confidentiality rule.

This probably means that if a disclosure would be permitted by Rule 1.6(b) (see below), then the disclosure is probably going to be required by Rule 4.1(b).

Huh?

The ABA/BNA Practice Guide takes a stab at single sentence translation of the interaction between the two rules:

> The net effect of Rule 4.1(b), therefore, is that it takes a subset of the disclosures permitted by Rule 1.6(b) *and makes them mandatory*.

How so?

Any disclosure permitted under Model Rule 1.6 (Confidentiality) is not prohibited by the rule and therefore becomes a mandatory disclosure under Model Rule 4.1(b).

Confidentiality

Clients hate it when lawyers blab. If that is hard for any lawyer to understand, then the lawyer should imagine his infectious disease doctor at a crowded party, where the doctor overhears someone mention the lawyer's name. The doctor joins the conversation and tells everyone that she knows the lawyer quite well, because the lawyer is one of her patients. "And what kind of doctor are you again?" someone asks.

ABA Model Rule 1.6: Confidential Information

Model Rule 1.6(a) begins with an overarching vow of silence:

A lawyer SHALL NOT reveal information relating to the representation … UNLESS:

- the client gives informed consent,
- the disclosure is impliedly authorized OR
- the disclosure is permitted by some exception to this rule.

Exceptions

Part (b) of the same rule lists seven exceptions to the overarching command of thou shalt not disclose confidential information, here edited for the sake of brevity.

A lawyer MAY reveal confidential information … if necessary:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime or fraud that … [will] cause substantial injury … [$ or property].
3. to prevent mitigate or rectify substantial injury [$ or property] that … [will] result or has resulted from the client's commission of a crime or fraud
4. to get legal advice about complying with these Rules;
5. to establish a claim or defense on behalf of the lawyer … or
6. to comply with other law or a court order.
7. to detect and resolve conflicts of interest arising from the lawyer's change of employment.

(Notice these are only EDITED reminders of the exceptions. For instance, note how the full text of exceptions (b)(2) and (b)(3) specify that they apply only

if THE CLIENT is committing or has committed a crime or fraud, and even then only when the client IS USING or HAS USED the lawyer's services.)

Those are two big qualifications to a rule that, on first reading, seems to deputize lawyers in the fight against financial fraud. This is not a IF YOU SEE SOMETHING, SAY SOMETHING rule. The lawyer must be sure that all the ingredients of the exceptions apply before deciding to disclose under Rule 1.6(b)

Note also that new exception (b)(7) allowing lawyers to disclose confidential information when changing employment applies "only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client."

Nebraska's Model Rule § 3-501.6. Confidentiality of information.

Nebraska's Rule begins with the same vow of silence, but it features a mere four exceptions in its part (b):

A lawyer MAY reveal confidential information … if necessary:

1. to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

2. to secure legal advice about the lawyer's compliance with these Rules;

3. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

4. to comply with other law or a court order.

Nebraska's exception "to prevent the client from committing a crime" seems broad, but probably does the same job as ABA Model Rule 1.6(b)(2) and (3).

Conclusion

Most lawyers of a certain age learned that confidentiality is nearly absolute and the exceptions to the rule are PERMISSIVE. A lawyer MAY disclose under the enumerated exceptions. But Model Rule 4.1(b) arguably makes a subset of those otherwise permissive disclosures MANDATORY if keeping silent means "assisting a criminal or fraudulent act by a client."

Most lawyers are unaware of this probable effect and unaware that under the circumstances described in Model Rule 4.1(b) silence indeed amounts to falsehood and complicity in criminal or fraudulent acts committed by their clients.