
ARTICLE

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Am I a “Licensed Liar”? An Exploration into the Ethic of Honesty in Lawyering . . . and a Reply of “No!” to the Stranger in the La Fiesta Lounge

Abstract. After hearing for the first time the lawyer-disparaging phrase, “licensed liar,” the author investigated its significance. This article presents the question of those two words’ meaning and explains how the author reached the conclusion that, as applied to attorneys, the phrase is an unmerited epithet.

The phrase is known and utilized in nonlegal texts in fields such as fiction, poetry, literary criticism, and journalism, but the two words are absent from legal texts. The author’s discovery of the phrase in various criticisms of lawyers in other publications illuminates and confirms that the phrase constitutes the pejorative allegation that an attorney will engage in prevarication for clients in exchange for compensation.

In tracing the history of the question of lawyer honesty, this Article shows honesty to be a persistent ethical obligation. When the essence of the phrase, a supposed willingness to speak untruths with deceptive intent for a fee, is compared to not only the persistently stated ethic of honesty in the practice of law, but also the reality of professional discipline that can result from violations, the phrase is seen to be an unjustified epithet.

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I. HEARING THE PHRASE “LICENSED LIAR” FOR THE FIRST TIME

One evening during a vacation in Santa Fe, New Mexico, I enjoyed country music in the La Fiesta Lounge of the venerable La Fonda Hotel. After I stepped away for a few minutes, an unknown man approached my wife, took up her hand unexpectedly, and, pointing to her ring, asked, “What kind of work does your husband do?” “He’s a lawyer,” she replied. “*No, he’s not!*” exclaimed the stranger. “He’s a *licensed liar!*”

Just then I returned, the stranger quickly departed, and my wife reported his statement and its vehement tone. I had never heard the phrase “licensed liar.” Immediately it struck me as, at the least, a derogatory comment. We grimaced and tried to laugh—lawyers and their spouses must have thick skins in an era in which lawyer jokes, legal-profession criticisms, and stories about attorneys accused of nefarious conduct¹ recurrently ricochet through our email inboxes and reverberate across the media and Internet. I wondered what the stranger’s utterance really meant.

The man did not know me, so his words must have referred to the entire bar. He spoke the two words as a phrase, so the past participle *licensed* and the noun *liar* were linked in an overall meaning, whatever it was. *Liar* is obviously a pejorative term. What exactly did his addition of the modifier *licensed* add to that already negative meaning? Of course attorneys are aware, as public opinion polls over several decades have demonstrated, that the profession has a poor reputation for honesty and good ethics.² But does admission to the organized bar in any way provide attorneys a “license to lie”? Do lawyers deal and trade in falsehoods under the cover of our state-granted law licenses? And the stranger had gestured to my wife’s ring; that seemed to insinuate that attorneys willingly participate in prevarication for the sake of making money from clients.

This Article recounts my exploration of these questions in all the texts and sources I could find and how I reached the conclusion that attorneys are *not* “licensed liars” and that the phrase is an unjustified epithet.

1. See Benjamin Weiser, *Defending the Notorious, and Now Himself*, N.Y. TIMES, Jan. 6, 2013, at MB1 (reporting the grievance proceedings and embezzlement allegations against “a prominent criminal defense lawyer in New York, [who] has long believed in doing whatever it takes to win a case, ‘going to the line,’ as he puts it — the line between putting on an aggressive defense and an unethical one”).

2. See RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2:2 (2016), available at Westlaw (reflecting on a negative turn in the public perception of attorneys—beginning with the Watergate scandal—from which the profession has never substantially recovered).

II. RESEARCHING THE PHRASE

To begin, I navigated my computer to those easy, all-purpose research methodologies: the Internet search engines Google³ and Bing.⁴ No definition of the phrase popped up, but search results included Internet message board postings that utilize the phrase “licensed liar” as a bitter criticism of attorneys by people who have been, in one way or another, disappointed in their personal experiences with attorneys.⁵ These references at least confirmed my contemporaneous sense that the phrase bears an uncomplimentary denotation and that the stranger in the bar was not the first person to call a lawyer a “licensed liar.”

I checked other handy resources, *Black’s Law Dictionary*⁶ and the *Dictionary of Modern Legal Usage*,⁷ and I performed a search in Westlaw⁸ and Lexis⁹ for the two-word term in all federal and state statutes and case law, but it could not be found in those sources. I could not find the phrase in any other dictionary,¹⁰ so I looked more broadly for a definition or indications of meaning in other texts.

A. *In Literary, Critical, and Journalistic Texts*

Pursuing deeper, full-text searches through Google Books¹¹ and Google Scholar,¹² and also utilizing conventional research methods in a university’s library of books printed on paper, my research uncovered multiple deployments of the term “licensed liar” in almost all genres and forms of English-language literature. The largest number of results was found in

3. GOOGLE, <https://www.google.com> (last visited Dec. 19, 2016).

4. BING, <https://www.bing.com> (last visited Dec. 19, 2016).

5. Such postings can be ephemeral. The author has retained copies in his file of instances he found.

6. BLACK’S LAW DICTIONARY (10th ed. 2014).

7. A DICTIONARY OF MODERN LEGAL USAGE (1st ed. 2001).

8. The search was in the “Federal Cases” and “State Cases” databases. WESTLAW, www.westlaw.com (last visited Dec. 19, 2016).

9. The search was in the “Federal & State Cases, Combined” database. LEXISNEXIS, www.lexis.com (last visited Dec. 19, 2016).

10. The phrase “licensed liar” does not appear in either of two dictionaries of slang. *See* AMERICAN SLANG DICTIONARY (Richard A. Spears ed., 2007); *see also* AMERICAN SLANG (Barbara Ann Kipfer & Robert L. Chapman eds., 4th ed. 2008). One near miss was finding the term used as a definition of a French phrase: “*menteur patenté* [is] literally and colorfully translated as ‘*licensed liar*.’” EUGENE EHRLICH, LES BONS MOTS: HOW TO AMAZE TOUT LE MONDE WITH EVERYDAY FRENCH 203 (1997) (emphasis added).

11. GOOGLE BOOKS, <http://books.google.com/> (last visited Dec. 19, 2016).

12. GOOGLE SCHOLAR, <http://scholar.google.com/> (last visited Dec. 19, 2016).

the genre of fiction. For instance, a Victorian-era short story titled *The Beau's Stratagem* employed the phrase in describing a courtship ploy of the first-person narrator.¹³ An instance from long fiction is Irving Bacheller's early twentieth-century novel, *"Charge It" or Keeping Up With Harry*, in which the narrator remarks, "Of course I shall talk too much, but I am a *licensed liar*."¹⁴

Furthermore, I found the phrase used in literary criticism. Most recently, a critic, Eefje Claassen, wrote, "The writer of fiction . . . is what some have called 'a *licensed liar*': in terms of truth-value, he is obviously lying."¹⁵ In another example, the critic and historian Paul Johnson wrote of Mark Twain in his 2006 book *CREATORS*:

Twain grasped . . . the essential immorality of storytelling. A man telling a tale is not under oath. He must insist, indeed he must insist, that his story is true. But this does not mean that it is true, or that it needs to be A storyteller is a *licensed liar*.¹⁶

The novelist Margaret Atwood explained similarly: "All novelists are *licensed liars*. They write down stories about people who don't exist and events that never happened."¹⁷ I found other examples of these literary

13. *The Beau's Stratagem: A Complete Story, in 12 ALL THE YEAR ROUND: A WKLY. J. CONDUCTED BY CHARLES DICKENS*, Aug. 4, 1981 110, 110. The narrator explains:

I was ready to do or say anything that might help me to gain Miss Merton's good opinion. Consequently when she asked if I liked children, I replied without hesitation in the affirmative A lover is a *licensed liar*, and, therefore, it was without a scruple that I uttered a prompt, enthusiastic "Yes," and waited for my reward in the shape of a smile or a few approving words. But somehow my manner failed to convince Miss Merton, for she looked at me somewhat incredulously.

Id. (emphasis added).

14. IRVING BACHELLER, "CHARGE IT" OR KEEPING UP WITH HARRY 12 (1912). (emphasis added). A more recent example: "It was the most unpleasant and stunning news of the entire argument. She coughed once, twice, then she answered, 'Whoever gave you that information is a *licensed liar*.'" ANTONIO CASALE, *WINDS OF LOVE* 342 (2015) (emphasis added).

15. EEFJE CLAASSEN, *AUTHOR REPRESENTATIONS IN LITERARY READING* 106 (2012) (emphasis added).

16. PAUL JOHNSON, *CREATORS: FROM CHAUCER AND DÜRER TO PICASSO AND DISNEY* 172–73 (2006) (emphasis added).

17. Margaret Atwood, *Boundaries of the Imagination: Silencing the Scream*, *PROFESSION*, 1994, at 44, 44 (emphasis added). A search of dissertations online turned up one that observes:

[T]he category of fictional utterances does not obey the rules that apply to everyday speech, such as "be truthful and sincere[.]" If speakers do not follow these rules they are considered to be lying, saying things that are false, mistaken, or pointless et cetera. The writer of fiction, on the other hand, is what some have called "a *licensed liar*"; in terms of truth value he is obviously lying.

ELISABETH HENRICA PETRONELLA MARIA CLAASSEN, *THE AUTHOR'S FOOTPRINTS IN THE GARDEN OF FICTION: READERS' GENERATION OF AUTHOR INFERENCES IN LITERARY READING*

pieces.¹⁸

Similarly, the literary critic Northrop Frye used the term “licensed liar” in describing other writers of fiction, the poets. In one book he wrote, “[t]he apparently unique privilege of ignoring facts has given the poet his traditional reputation as a *licensed liar*.”¹⁹ Likewise, a British poet and critic, Sheenagh Pugh, has written of herself: “I am a *licensed liar*; it is my profession to embroider the truth and make it more interesting.”²⁰ Moreover, the additional research discovered instances of writers applying the phrase pejoratively toward real, not fictional, persons. In a 1998 book exploring the origins of the genre of science fiction literature, author Thomas M. Disch scorned the late nineteenth-century spiritual medium Helena Petrovna Blavatsky as a “charlatan of indomitable chutzpah” whose *apologia pro vita sua*²¹ was “[s]poken like a *licensed liar*”²²

Journalism furnished examples. In 1918, American journalist George Harvey reiterated the phrase in a sneering commentary published in the *North American Review’s War Weekly*²³ that he styled as a response to a critical letter the publication had received from George Creel.²⁴ Creel, also a

91 (2008) (emphasis added).

18. See GEORGES DENIS ZIMMERMANN, *THE IRISH STORYTELLER* 565 (2000) (“The ‘*licensed liar*’ does not expect to be believed by the members of the community who have been socialized into seeing a joke and identifying deliberate assaults on credibility.”) (emphasis added); see also YINGJIN ZHANG, *THE CITY IN MODERN CHINESE LITERATURE & FILM: CONFIGURATIONS OF SPACE, TIME, AND GENDER* 52 (1996) (“[T]he storyteller [i]s a specially *licensed liar*.”) (emphasis added).

19. Northrop Frye, *Ethical Criticism: Theory of Symbols*, in NORTHROP FRYE, *ANATOMY OF CRITICISM: FOUR ESSAYS* 71, 75 (1957) [hereinafter *Theory of Symbols*] (emphasis added). Another time, Frye wrote: “We can understand . . . how the poet got his reputation as a kind of *licensed liar* [because] . . . [t]he word poet itself means liar in some languages . . .” NORTHROP FRYE, *THE EDUCATED IMAGINATION* 34 (House of Anansi Press Ltd. 1963) (emphasis added).

20. Sheenagh Pugh, *Say What You See*, *SHEER POETRY*, (emphasis added), <http://www.sheerpoetry.co.uk/gcse/sheenagh-pugh/say-what-you-see> (last visited Dec. 19, 2016). Kirby Farrell, however, writes that Shakespeare “aspires to be more than a vendor of words or a *licensed liar* . . . he wants to claim a certain truth, meaning or order for his art . . .” James L. Calderwood, *Richard II: The Fall of Speech*, in *CRITICAL ESSAYS ON SHAKESPEARE’S RICHARD II* 189, 194 (Kirby Farrell ed. 1999) (emphasis added).

21. *Apologia pro vita sua*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2006) (defining as “defense of one’s life” or “written justification for one’s belief or course of conduct”).

22. THOMAS M. DISCH, *THE DREAMS OUR STUFF IS MADE OF: HOW SCIENCE FICTION CONQUERED THE WORLD* 55 (1998) (emphasis added). A century earlier, a British memoirist similarly used the phrase when referring to “Persian diplomatists” as adept “in the perplexing arts and artifices which go to the making of the *licensed liar*.” Wilfrid Sparroy, *A Study in the Persian Apparatus*, *MACMILLAN’S MAG.*, May–Oct. 1900, at 337, 346 (emphasis added).

23. George Harvey, *We Hear From Mr. Creel*, *N. AM. REV.’S WAR WKLY.*, Sept. 14, 1918, at 13, 16 (“George Creel is a licensed liar—Senator Reed. Who licensed him?”).

24. See ALAN AXELROD, *SELLING THE GREAT WAR: THE MAKING OF AMERICAN*

journalist, had served under President Woodrow Wilson as the head of the nation's propaganda agency during World War I. The editorialist stated:

Nor at any time have we regarded Senator Reed's depiction of Mr. Creel as a "*licensed liar*" as warranted. Not only is there no statute providing for the issuance of licenses to prevaricators, but we have it upon the authority of trustworthy witnesses who have seen Mr. Creel disporting upon the beach that he does not wear the customary tag inscribed with his name, breed and place to be returned if found astray.²⁵

Much more recently, a British journalism professor, Ray Boston, writing about himself said, "being a journalist was like being a *licensed liar* or a wizard with words."²⁶

Such references in literature, literary discourse, and journalism are interesting, understandable, and benignant—the phrase as used in literature and literary criticism seems fairly synonymous with the term "poetic license"—but only partially helpful to understand the meaning of the phrase spoken by the stranger to my wife in the hotel lounge in Santa Fe. In none of those literary and journalistic quotations is the subject phrase directed toward a lawyer. Rather, in each of those situations, novelists and poets are speaking (through their writings) untruths in the service of art, but the authors are acting for themselves as creators and communicators of verses, stories, and novels, or in criticism of such literary works.²⁷ In the examples from journalism, the writer is either reporting someone else's utterance as allegedly false,²⁸ or applying the phrase "licensed liar" to himself to indicate

PROPAGANDA 127–28 (2009) (describing Creel's role as national censor in charge of the Creel Committee).

25. Harvey, *supra* note 23, at 16 (emphasis added). Further research about the incident referred to by Harvey reveals that U.S. Senator David Aiken Reed called Creel a "licensed liar" during a Senate hearing in 1918 on the performance of American fighter planes during that just-concluded war. *Aircraft Failure Evidence Bared by the Senate*, N.Y. TIMES, Aug. 24, 1918, at 6 ("I think it is time that this licensed liar—and I use that term advisedly, for I know the gentleman and knew him before he came here—should by his superiors have a bridle put upon him."). A search of the entire *New York Times* archive from 1851 to February 18, 2014, shows this report of the statement by Senator Reed to be the sole usage in that newspaper of the term under consideration. However, Creel had been called a "licensed liar" even earlier. See AXELROD, *supra* note 24, at 127 ("From the beginning, many in government opposed the elevation of a 'radical journalist,' a 'campaign huckster,' 'depraved hack,' and '*licensed liar*' [Creel] to the post of national 'censor.'" (emphasis added)).

26. Ray Boston, *My Kind of Journalism*, 13 BRIT. JOURNALISM REV., no. 1, 2002, at 60, 60.

27. E.g., JOHNSON, *supra* note 16, at 172–73 ("A man telling a tale is not under oath. He may insist, indeed he must insist, that his story is true. But this does not mean that it is true, or that it needs to be . . . A storyteller is a *licensed liar*." (emphasis added)).

28. E.g., *Theory of Symbols*, *supra* note 19, at 75 ("The apparently unique privilege of ignoring the facts has given the poet his traditional reputation as a *licensed liar*." (emphasis added)).

“wizard[ry] with words.”²⁹

B. *In Lawyer-Related Literature*

The essence of what lawyers “do,” widely referred to as *lawyering*,³⁰ can sometimes bear a similarity to creative writing. But lawyering is fundamentally different from fiction writing, poesy, and journalism. Lawyers are good with words,³¹ but, significantly, a lawyer writes and speaks in the capacity of an “agent [who] invokes and manipulates, or advises about, the dispute-resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in, or preserving, the status quo *for his or her [client]*.”³² So my analysis turned to occurrences of the phrase directed to or about lawyers said to be speaking or communicating untruths in the course and scope of their capacity as legal representatives for clients.

Textual searches turned up a half-dozen works of contemporary fiction in which the phrase “licensed liar” was employed—quite disparagingly—in direct reference to lawyers. In a novel titled *The Calling*, author Karl Arthur applied the phrase invectively to an attorney: “But then again, she was a professionally-trained *licensed liar*, otherwise known as a common sewer-dwelling lawyer. And an incompetent one at best.”³³

Another recent novel, *Aulus’ Dream of Parenthood* by Jacques Guillaume, contains this dialog:

Baby, do you know the key difference between a lawyer and a physician,” Ms. Valerie asked.

29. Boston *supra* note 26, at 60 (“[B]eing a journalist was like being a *licensed liar* or a wizard with words.” (emphasis added)).

30. *Lawyer, Lawyering*, A DICTIONARY OF MODERN LEGAL USAGE (1st ed. 1987). *But see Lawyering*, BLACK’S LAW DICTIONARY (10th ed. 2014) (recognizing that *lawyering* can be used in the context of someone who is not a lawyer).

31. *See* JONATHAN SHAPIRO, LAWYERS, LIARS, AND THE ART OF STORYTELLING 8 (2016) (“Storytelling—what it is, why it matters, how to do it—is not, therefore, a metaphor for legal advocacy. It is legal advocacy itself.”); *see also* Linda E. Fisher, *Truth as a Double-Edged Sword: Deception, Moral Paradox, and the Ethics of Advocacy*, 14 J. LEGAL PROF. 89, 89 (1989) (“Lawyers wield the power of language and affect the lives of clients in complex and difficult situations.”).

32. Josiah M. Daniel, III, *A Proposed Definition of the Term “Lawyering”*, 101 LAW LIBR. J. 207, 215 (2009) (emphasis added); *see also* Robert K. Vischer, *Moral Engagement Without the “Moral Law”: A Post-Canons View of Attorneys’ Moral Accountability*, 2008 J. PROF. LAW. 213, 213 (2008) (“The primary objective, when it comes to lawyers, is to attain the client’s stated objectives to the extent permitted by law.”). In 2014, *Black’s* substantially adopted my definition of the term “lawyering.” *Lawyering*, BLACK’S LAW DICTIONARY (10th ed. 2014).

33. KARL ARTHUR, *THE CALLING* 177 (2005) (emphasis added).

Sophie replied, "I have no clue, mom."
 "Well, my dear, a lawyer is a *licensed liar* while a physician is a pathetic liar,"
 giggled Valerie.
 Sophie laughed Her mom's joke was quite funny.³⁴

In another novel, *Rose Hill*, Reed M. Wolcott critically employed the phrase: "They shouldn't come with a lawyer, a *licensed liar*, an' fifty dollars an' get the case thrown out. I believe in put-tin' teeth in the law an' makin' it bite."³⁵ These insulting usages are similar to some vituperative usages of the phrase "licensed liar" used in criticisms of attorneys I saw in Internet message board postings.³⁶

Other examples occur in recent nonfiction writings that are critical of lawyers. One is in a diatribe titled *Demons of Democracy*:

Those who dispense [justice] from the bench look with an oblique eye at anyone who defends himself without a *licensed liar*. A pro se, someone who defends himself without an attorney, usually fails in his efforts before a court of law. The primary reason is it would be the beginning of the end for the legal profession.³⁷

Another is contained in *The Contractor Image*, a do-it-yourself guide for building contractors: "As far as the legal wording, I can't really dive into it too much, as I'm not a *licensed liar*, I mean lawyer."³⁸ In common with the quotations from contemporary novels, these references to lawyers, if not derogatory, are certainly disdainful.

But much earlier, and more important for analysis of the utterance of the stranger in the LaFonda Hotel bar, a denunciatory application of the phrase was written in a nonfiction essay published 175 years ago by the important nineteenth-century British legal and political philosopher, Jeremy Bentham.³⁹ As a part of his wide-ranging survey of English law, Bentham examined writ of error practice as it existed then in England; and in framing his conclusion, Bentham aimed the phrase in reproach of certain British lawyers:

34. JACQUES GUILLAUME, *AULUS' DREAM OF PARENTHOOD: PATIENCE, KINDNESS, COURAGE AND FORGIVENESS* 31 (2013) (emphasis added).

35. REED M. WOLCOTT, *ROSE HILL* 278 (1976)(emphasis added).

36. Such postings can be ephemeral. The author has retained copies in his file of instances he found.

37. MARK DAVIS, *DEMONS OF DEMOCRACY* 9 (2010) (emphasis added).

38. BRYAN LEE HEMSTAD, *THE CONTRACTOR IMAGE: HOW TO CREATE AND MARKET AN AWESOME IMAGE IN TODAY'S WORLD* 160 (2009) (emphasis added).

39. 7 JEREMY BENTHAM, *Rationale of Judicial Evidence, in THE WORKS OF JEREMY BENTHAM* (Russell & Russell 1962) (1838).

Writs of error [totaling] 1,809 in three years, whereof only 19 [were] argued. What is certain is, that, in the 1,790 in which there was no argument, the non-existence of the alleged error was no less perfectly known to the *licensed liar* by whom the existence of it was asserted, than to his injured adversary.⁴⁰

Lawyers today can apprehend his criticism; he is emphasizing that his survey showed that the vast majority of appeals initiated by lawyers for unsuccessful litigants lacked any bona fide basis.⁴¹

But in all my research, the most significant and disparaging application of the two-word locution to lawyers is in a book of verse, *Black Beetles in Amber*, published in 1892 by Ambrose Bierce. In *To An Insolent Attorney*, Bierce wrote:

Talk not of “hire” and consciences for sale—
 You whose profession ‘tis to threaten, rail,
 Calumniate and libel at the will
 Of any villain who can pay the bill—
 You whose most honest dollars all were got
 By saying for a fee “the thing that’s not!”
 To you ‘tis one, to challenge or defend;
 Clients are means, their money is an end.

 Happy the lawyer!—at his favored hands
 Nor truth nor decency the world demands.
 Secure in his immunity from shame,
 His cheek ne’er kindles with the tell-tale flame.
 His brains for sale, morality for hire,
 In every land and century a *licensed liar*!⁴²

Bierce was an American satirist, critic, poet, short story author, editor, and journalist in the decades following the Civil War; the lawyer about

40. *Id.* at 215 (emphasis added).

41. *Id.*

42. 5 AMBROSE BIERCE, *To an Insolent Attorney*, in THE COLLECTED WORKS OF AMBROSE BIERCE: BLACK BEETLES IN AMBER 240, 241 (Gordian Press 1966) (1911) (emphasis added). Nine years later, a Bierce copycat paraphrased the key lines of “*To an Insolent Attorney*” without attribution in a short story: “You, sir, are a criminal advocate; it is your business to defend or prosecute, as your retainer bids; to shut your eyes to the verities and attempt to close others’ vision. What are you but a *licensed liar*?” Gelett Burgess, *Lady Méchante*, THE SMART SET: A MAGAZINE OF CLEVERNESS, Sept. 1900, reprinted in 2 THE SMART SET: A MAGAZINE OF CLEVERNESS, Jul.–Dec. 1900 at 53, 59.

whom he wrote, Hall McAllister, was not a fictional character but rather the best known and most financially successful attorney in California from the 1850s through the 1880s. McAllister's spectacular defense of Adolf Spreckels for his brazenly attempted murder of Michael H. de Young, the editor of the *San Francisco Chronicle*, incensed Bierce.⁴³

Bierce's lines, accessible in libraries today,⁴⁴ correspond with the sense and the vehemence with which the stranger at the bar in Santa Fe voiced the phrase to my wife.⁴⁵ It was meant as a disparagement, even an opprobrium. *To an Insolent Attorney* is the fullest expression my research found of the averment that, for money ("at the will / Of any villain who can pay the bill"⁴⁶), and in disregard for principles of morality ("His cheek ne'er kindles with the tell-tale flame"⁴⁷), a lawyer will even stoop to telling lies in the service of a paying client ("saying for a fee 'the thing that's not!").⁴⁸

43. JAMES D. HART, A COMPANION TO CALIFORNIA 293 (1987). McAllister was a lawyer whose "aristocratic style, logical reasoning, and thoroughness made him a famous figure before juries" and received larger fees than all other contemporary California attorneys. *Id.* His professional and civic reputation survived the attack of Bierce: "[a] San Francisco street is named for him. *Id.* Additionally, the attorney is memorialized by a statue at San Francisco's city hall with the inscription "HALL MCALLISTER/LEADER OF THE CALIFORNIA BAR/LEARNED ABLE ELOQUENT/FEARLESS ADVOCATE/A COURTEOUS FOE." Hall McAllister, (sculpture), SMITHSONIAN AM. ART MUSEUM, SMITHSONIAN INSTITUTION RES. INFO. SYS., <http://siris-artinventories.si.edu/ipac20/ipac.jsp?session=14G881845924B.1996&menu=search&aspect=Keyword&npp=50&cipp=20&spp=20&profile=arial&ri=&term=&index=.GW&x=11&y=6&aspect=Keyword&term=&index=.AW&term=&index=.TW&term=&index=.SW&term=&index=.FW&term=&index=.OW&term=76004807&index=.NW> (last visited Dec. 19, 2016).

44. Bierce's usage of "licensed liar" is probably the most significant usage directed at attorneys as confirmed by one book including the phrase, under the heading "Lawyers," as part of the last six lines of *To an Insolent Attorney*. FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 277 (1993). In addition to Bierce's works that many university libraries continue to shelve, *To an Insolent Attorney*, or excerpts containing the subject phrase, are available in reference works such as *Ambrose Bierce*, ENCYCLOPEDIA OF AMERICAN POETRY THE NINETEENTH CENTURY (Eric L. Haralson ed., 1998). Bierce's verse, including the subject piece, is also republished in works such as POEMS OF AMBROSE BIERCE 94 (M.E. Grenander ed., 1995).

45. Consistently, Bierce wrote in his later book, THE DEVIL'S DICTIONARY, that a "liar" is merely a "lawyer with a roving commission." AMBROSE BIERCE, *The Devil's Dictionary*, in 7 THE COLLECTED WORKS OF AMBROSE BIERCE: THE DEVIL'S DICTIONARY 191, 191 (Neale Publishing Co. 1911).

46. BIERCE, *supra* note 42, at 241.

47. *Id.*

48. *Id.* Completing my literature search on HEINONLINE, <http://www.heinonline.org> (last visited Dec. 19, 2016), I turned up the sole relevant article in legal journals in which the two-word phrase is used. J. Gordon Hylton dissected Bierce's antipathy to the legal profession: "He was vituperative against judges . . . and above all lawyers." J. Gordon Hylton, *The Devil's Disciple and the Learned Profession: Ambrose Bierce and the Practice of Law in Gilded Age America*, 23 CONN. L. REV. 705, 711 (1990) (quoting 5 AMBROSE BIERCE, *To an Insolent Attorney*, in THE COLLECTED WORKS OF AMBROSE BIERCE: BLACK BEETLES IN AMBER 240, 241 (Gordian Press 1966) (1911)). However, while he quoted from "*To An Insolent Attorney*," including the lines "In every land and century a licensed liar!" Hylton did not discuss the two-word phrase "licensed liar." *Id.*

III. PARSING THE PHRASE

Having completed my survey of incidences of “licensed liar” in available literature, I continued my investigation by parsing the two terms that comprise the phrase.

A. “Liar”

The stranger in the bar must have known the noun “liar,” standing alone, clearly has a quite negative denotation. Dictionaries concur that the essential elements of liar’s definition are the telling of an untruth. *Black’s* does not define “liar” but it does define “lie” in two ways: (1) “[a] false statement or other indication that is made with knowledge of its falsity”; and (2) “an untruthful communication intended to deceive.”⁴⁹ In both definitions, the key element is intentional falseness or untruthfulness; but in the second definition, the speaker’s intention is “to deceive.”⁵⁰ *Black’s* supports its definition with a quotation from Neil MacCormick’s 2008 book, *Practical Reason in Law and Morality*,⁵¹ which explains that a lie is not based on a mistake or made in jest, but rather “the speaker must intend the statement seriously, or at least realize that the addressee . . . will reasonably assume that it is being made seriously.”⁵²

Employing Westlaw⁵³ and Lexis⁵⁴ once again in a search for the noun “liar,” I found a judicial explanation of the noun “liar,” centering on the first definition provided by *Black’s*, in the 1990 libel case *Milkovich v. Lorain Journal Co.*⁵⁵ There, Chief Justice William Rehnquist wrote: “If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones *told an untruth.*”⁵⁶ A scan of other federal and state case law indicates use of the word “liar” in arguments at a trial is a reversible error in some situations⁵⁷ and not in others,⁵⁸ but “liar” is

49. *Lie*, BLACK’S LAW DICTIONARY (10th ed. 2014).

50. *Id.*

51. NEIL MACCORMICK, PRACTICAL REASON IN LAW AND MORALITY (2008)

52. *Lie*, BLACK’S LAW DICTIONARY (10th ed. 2014) (quoting NEIL MACCORMICK, PRACTICAL REASON IN LAW AND MORALITY 69 (2008)).

53. WESTLAW, <http://www.westlaw.com> (last visited Dec. 19, 2016).

54. LEXISNEXIS, <http://www.lexis.com> (last visited Dec. 19, 2016).

55. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

56. *Id.* at 18 (emphasis added).

57. *See, e.g.*, *Moore v. United States*, 934 F. Supp. 724, 729 (E.D. Va. 1996) (explaining the “line between permissible and impermissible use of the terms is drawn by reference to whether they are used in a context intended either to convey . . . personal opinion or to suggest . . . [the existence of] extra-judicial information regarding the credibility of a defendant or witness”).

58. *See Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 841 (Tex. 1979) (holding the accusations

uniformly regarded as at least an epithet. The legal literature confirms that understanding. *The Restatement of Torts* comments that “liar” is at least an “insult.”⁵⁹

Under these authorities, the irreducible element of the definition of “liar” is the speaking or communicating of an untruth; but the word “liar” also conveys an assertion of deceptive *intent* on the part of the speaker.⁶⁰ *Merriam-Webster's Collegiate Dictionary*, for example, defines “lie” as meaning “to make an untrue statement with intent to deceive.”⁶¹ Thus, the full meaning of one who speaks a lie includes a significant admixture of reprehensibility and condemnation. As the philosopher Harry G. Frankfurt wrote, “the *liar* tries to *mislead us into believing* that the facts are other than they actually are.”⁶²

Another philosopher, Don Fallis, posited this definition of “lie”:

You *lie* to X if and only if:

- (1) You state that *p* to X.
- (2) You believe that you make this statement in a context where the following norm of conversation is in effect:

Do not make statements that you believe to be false.

- (3) You believe that *p* is false.⁶³

As a third philosopher and linguist, S. Morris Engel, has put the analysis into a syllogism:

[A]n epithet like “*Liar!*” hurled at someone is in essence an argument—and a formally valid one at that. For, unpacked, what it contains is the

made by Standard Fire did not alter the jury’s verdict, which was “a ‘careful verdict upon the basis of the evidence’). One commentator has written, “[i]t cannot be said, therefore, that counsel may . . . freely refer to him as a ‘liar.’ Rather, the effect of the remark must be analyzed in light of the totality of the argument.” Harry Caldwell, *Name Calling at Trial: Placing Parameters on the Prosecutor*, 8 AM. J. TRIAL ADVOC. 385, 387 (1985).

59. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d, illus. 4 (AM. LAW INST. 1965) (“A calls her . . . a God Damned liar A’s conduct, although insulting, is not so outrageous or extreme to make A liable to B.”). Moreover, psychologists have characterized the word “liar” as an “aggressive epithet.” See James M. Driscoll, *Aggressiveness and Frequency-of-Aggressive-Use Ratings for Pejorative Epithets by Americans*, 114 J. SOC. PSYCHOL. 111, 119 (1981) (rating 316 pejorative epithets, including “liar,” for aggressiveness and “frequency-of-aggressive-use”).

60. See *Lie*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “lie” as “an untruthful communication intended to deceive”).

61. *Lie*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2006).

62. HARRY G. FRANKFURT, ON TRUTH 77 (2006) (emphasis added); see also HARRY G. FRANKFURT, ON BULLSHIT 7–8 (2005) (“[A] lie . . . requires that the liar makes his statement in a certain state of mind—namely, with an intention to deceive.”).

63. Don Fallis, *What is Lying?*, 106 J. PHIL. 29, 34 (2009).

following reasoning:

All people who *try to deceive* others by uttering what they *know to be false* are liars.

You are such a person.

Therefore you are a *liar*.⁶⁴

Clearly, these sources agree the noun “liar” is an assertion that assigns a deceptive intent to the speaker in her utterance of a falsehood.

B. “Licensed”

The adjectival addition of the past participle “licensed” intensifies the negative denotation of the phrase “licensed liar” as applied to lawyers because they hold a license or governmental authorization to do and say certain things on behalf of clients in certain fora, or more broadly within the legal system, that unlicensed persons cannot.⁶⁵ Statutes and dictionaries provide relevant and useful definitions of the noun “license.”

For instance, as the Supreme Court noted in the Arizona immigration case,⁶⁶ Congress provided a broad definition of the term “license” in Title 5 of the United States Code: “‘license’ includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption[,] or other form of permission.”⁶⁷ *Black’s* defines “license” as “[a] privilege granted by a state or city upon the payment of a fee, the recipient of the privilege then being authorized to do some act or series of acts that would otherwise be impermissible.”⁶⁸ It adds the subsidiary definition of “[t]he certificate or document evidencing such permission.”⁶⁹ Thus “licensed” means “[h]aving official permission to do something, usu[ally] as evidenced by a written certificate.”⁷⁰ *Webster’s Dictionary* defines the noun “license” as “a right or permission granted in accordance with law . . . to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would

64. S. MORRIS ENGEL, *FALLACIES AND PITFALLS OF LANGUAGE: THE LANGUAGE TRAP* 14 (1994) (emphasis added).

65. See TEX. GOV’T CODE § 81.051 (West 2013) (requiring Texas lawyers to be licensed to practice law in the state).

66. See *Chamber of Commerce v. Whiting*, 563 U.S. 582, 595–96 (2011) (discussing similar definitions of “license” as set forth by both Arizona law and Congress).

67. 5 U.S.C. § 551(8) (2012).

68. *License*, BLACK’S LAW DICTIONARY (10th ed. 2014).

69. *Id.*

70. *Licensed*, BLACK’S LAW DICTIONARY (10th ed. 2014).

be unlawful.”⁷¹

Pertinent to attorneys, the adjective “licensed” must refer to their law licenses, which are the certificates demonstrating they have been granted the right to practice law and that generally provide membership in the “bar.” The legal profession is regulated through the mechanics of licensure and bar membership in each state and the District of Columbia.⁷² Years ago I wrote about the history of the “incorporation” of, or enactment of mandatory membership for attorneys in, the formerly voluntary Texas statewide bar organization under the State Bar Act of 1939.⁷³ All attorneys who receive a license to practice law from the Supreme Court of Texas must be, and automatically and involuntarily are, members of the statewide bar organization, and the same is more or less true in all of the states.⁷⁴ In short, to practice law—that is, to be authorized to serve clients as attorneys, to represent them in the legal system, and to charge them fees for those services—one must hold a license from a state government or from a unitary or mandatory bar association of the relevant state.⁷⁵ Whether viewed as an asset of its holder or as a predicate to the lawyer’s practice, a law license clearly is a valuable thing.⁷⁶

To complete the syntactic analysis, putting the two words—*licensed* and *liar*—back together, the phrase must mean, in a derogating fashion, that a practicing attorney at law speaks or uses untruths with deceptive intentions in the attorney’s work on behalf of a client who pays fees, and that the attorney’s state law license enables or permits such false speech. This analysis comports with the versified allegation of Bierce and for me, it completed the explication of the meaning the stranger in the lounge must have attached to the two-word phrase he spoke to my wife.

IV. SEARCHING FOR REQUIREMENTS OF ATTORNEY HONESTY IN LAW-PRACTICE TEXTS

But is the “licensed liar” scorn of Bierce and utterance of the stranger in the La Fiesta Lounge objectively correct—now or in the past, and to any

71. *License*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002).

72. *E.g.*, TEX. GOV’T CODE § 81.051 (West 2013) (indicating bar membership is required to practice law in the state of Texas).

73. Josiah M. Daniel, III, *Creating the State Bar of Texas, 1923-1940*, 42 TEX. B.J. 454 (1982) [hereinafter *Creating the State Bar of Texas*].

74. *See* GOV’T § 81.051(b) (requiring anyone who is licensed to practice law to enroll in the state bar).

75. *See id.* § 81.102 (noting no one may practice law without being a member of the state bar).

76. *See* Robert F. Reilly, *Valuation of Licenses and Permits*, INSIGHTS, Autumn 2014, at 53, 64–65 (2014) (discussing the value given to professional licenses when “they are at issue in a family law matter”).

extent—when applied to practicing attorneys? Turning my research, finally, to legal ethics and the question of honesty,⁷⁷ I located four relevant law-practice texts. The first is contemporary, and the others are historical.

A. *In the Current Ethical Regime of the Texas Bar*

A major purpose of regulating the practice of law through the granting of licenses to attorneys and mandatory membership in a statewide bar association is the application and enforcement of disciplinary rules.⁷⁸ Texas, as in other states, has a statewide bar organization that operates as an agency of the judicial branch.⁷⁹ The State Bar has sought and obtained adoption of an extensive set of rules for ethical attorney conduct by the Texas Supreme Court.⁸⁰ I reviewed the State Bar of Texas’s currently effective rules of legal ethics and called the Texas Disciplinary Rules of Professional Conduct (DRs),⁸¹ for specific rules that might speak most pertinently to the stranger’s “licensed liar” statement.

Several key DRs, and their accompanying, aspirational comments, provide a present-tense answer to the question. The DRs contain several proscriptions of dishonesty by attorneys.⁸² To begin, the first section of the Preamble to the DRs states:

A lawyer is a representative of clients, an officer of the legal system and a

77. I adopt the distinction of the noun “ethics” articulated by Professor Carol Rice Andrews: “[Ethics are] *standards of conduct* for a profession [rather than] aspirational or moral ideals.” Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1385 n.3 (2004) (emphasis added).

78. As presently stated, the requirement in Texas is:

Bar Membership Required.

(a) The state bar is composed of those persons licensed to practice law in this state. Bar members are subject to this chapter and to the rules adopted by the supreme court.

(b) Each person licensed to practice law in this state shall, not later than the 10th day after the person’s admission to practice, enroll in the state bar by registering with the clerk of the supreme court.

GOV’T § 81.051.

79. *Id.* §§ 84.001–.004.

80. *Id.* §§ 84.001–.004.

81. Tex. Disciplinary Rules Prof’l Conduct, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9).

82. In addition, the State Bar of Texas has created a “client’s security fund” in Texas [as] a means through the collective efforts of the bar to reimburse persons who have lost money or property *as a result of dishonest conduct of a lawyer.*” Tex. Disciplinary Rules Prof’l Conduct R. 1.14 cmt. 5 (emphasis added).

public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent *obligation of lawyers* is to maintain *the highest standards of ethical conduct*.⁸³

The Preamble articulates the foundational concept of what is often referred to as legal professionalism,⁸⁴ the notion that an attorney is not solely an agent for a principal but also is an officer of the legal system and a citizen with heightened responsibility—to maintain *the highest standards of ethical conduct*—both to the client and to the public.⁸⁵

The DRs themselves, illuminated by the comments that were also approved by the Texas Supreme Court, make honesty a crucial, required, and specific element of the ethical obligation of an attorney, both to her client and to the client's opponent or counterparty.⁸⁶ As to the client, the rules require that an attorney “provide[] a *client* with an *informed understanding* of the client's legal rights and obligations” and negotiate on behalf of a client “*consistent with requirements of honest dealing with others*.”⁸⁷ It is true that “a lawyer should *zealously* pursue clients' interests”⁸⁸ which may be part of the antagonism embedded in the phrase “licensed lawyer.” The lawyer is working to accomplish a result, causing a desired change or protecting the status quo, for the client;⁸⁹ but that professional zeal is to be exercised

83. *Id.* preamble ¶ 1. The Texas version of the preamble deviates in wording and style but not in substance from the Preamble of the ABA Model Rules of Professional Conduct. Compare MODEL RULES OF PROF'L CONDUCT preamble (AM. BAR ASS'N 1983), with Tex. Disciplinary Rules Prof'l Conduct preamble.

84. Legal professionalism is an “elusive concept,” with “overlapping uses” including as a description of “a profession as a distinct kind of occupation characterized by such features as special educational and licensing requirements; elements of nonmarket regulation, often in the hands of an occupational body rather than the state itself; and an announced ethos of public service” as an explanation why there is a “need for professions as nonmarket means of organizing certain occupations” and as assuring “that the unqualified do not deliver services and that the qualified deliver them as promised and at an appropriate level of quality”; as the “locus of regulation”; and as the “focus of aspiration.” Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 270–75 (1995).

85. The Preamble notes that the DRs establish “minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action” and that “[e]ach lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules.” Tex. Disciplinary Rules Prof'l Conduct preamble ¶¶ 7, 9.

86. *See id.* at ¶ 2 (requiring lawyers to conduct honest dealings).

87. *Id.* (emphasis added). According to the Preamble, this requirement facially applies not only professionally, but also in all aspects of life. *Id.* at ¶ 4 (“[C]onduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.”).

88. *Id.* at ¶ 3 (emphasis added).

89. Daniel, *supra* note 32, at 215–16 (expounding the results a lawyer seeks to gain for a client).

“within the legal system.”⁹⁰ “A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”⁹¹ In general, DR 8.04 provides, “[a] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”⁹²

Moreover, and also relevant to the “licensed lawyer” allegation, the Texas rules demand honesty of the attorney in his communications—both affirmatively stated and implicitly or unstated—with judges and other tribunals. Rule 3.03, titled “Candor Toward the Tribunal,” provides:

- (a) A lawyer shall *not* knowingly:
- (1) *make a false statement* of material fact or law to a tribunal;
 - (2) *fail to disclose* a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
 - (3) in an ex parte proceeding, *fail to disclose* to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
 - (4) *fail to disclose* to the tribunal 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
 - (5) offer or use evidence that the lawyer knows to be *false*.⁹³

Additionally, if she has offered false evidence and then learns of it, the lawyer must seek “to persuade the client to authorize the lawyer to correct or withdraw the false evidence”; if such efforts are unsuccessful, the lawyer “shall take reasonable remedial measures, including disclosure of *the true facts*.”⁹⁴

Furthermore, “[l]egal argument based on a knowingly false representation of law constitutes *dishonesty* toward the tribunal, according to the Texas Disciplinary Rules.”⁹⁵ And with limited exceptions, “a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer’s *honesty*, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.”⁹⁶

90. *Id.* at 215.

91. Tex. Disciplinary Rules Prof'l Conduct preamble ¶¶ 3, 4.

92. *Id.* R. 8.04(a)(3).

93. *Id.* R. 3.03(a) (emphasis added).

94. *Id.* R. 3.03(b) (emphasis added).

95. *Id.* R. 3.03 cmt. 3 (emphasis added).

96. *Id.* R. 8.03(a) (emphasis added).

A catchall rule provides simply, “A lawyer shall *not* . . . engage in conduct involving *dishonesty, fraud, deceit or misrepresentation.*”⁹⁷ Finally, the oath of office a newly admitted Texas attorney must take, confirms the obligation of honesty, integrity, and civility in law practice, as a result of a 2015 legislative amendment:

Section 82.037(a) Each person admitted to practice law shall, before receiving a license, take an oath that the person will: . . .

- (2) *honestly demean oneself in the practice of law;*
- (3) discharge the attorney’s duty to the attorney’s client to the best of the attorney’s ability; and
- (4) conduct oneself with integrity and civility in dealing and communicating with the court and all parties.⁹⁸

Honesty is a key element of that new statutory oath.

Perhaps the stranger in the La Fiesta Lounge was thinking of criminal defense attorneys, such as the lawyer particularly scorned by Bierce in *To an Insolent Attorney*.⁹⁹ Criminal defense attorneys are particularly reviled by many people because they defend not only the innocent but also “guilty criminals who have committed acts of violence or depravity.”¹⁰⁰ Yet, a lawyer that enters a not guilty plea on behalf of a client is not lying under the DRs, but rather speaking to the court as an agent of the client.¹⁰¹ This is true even if the defense attorney is fully aware her client did in fact commit the act for which he is criminally charged.¹⁰²

Moreover, and significantly for present purposes, “[a] lawyer shall *not* assist or counsel a client to engage in conduct that the lawyer knows is *criminal or fraudulent.*”¹⁰³ Indeed, “[w]hen a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another,” the lawyer must take reasonable steps to

97. *Id.* R. 8.04(a)(3) (emphasis added). “‘Fraud’ . . . denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.” *Id.* terminology.

98. TEX. GOV’T CODE § 82.037(a) (West Supp. 2016) (emphasis added).

99. See 5 AMBROSE, *supra* note 42, 240–41 (showing contempt for a criminal lawyer who is willing to lie for his client as long as he gets paid).

100. *Preface* to HOW CAN YOU REPRESENT THOSE PEOPLE? ix, ix (Abbe Smith & Monroe Freedman, eds., 2013).

101. Daniel, *supra* note 32, at 213 (“The lawyer-client relationship is one species of the broad agent-principal relationship.”).

102. See Tex. Disciplinary Rules Prof’l Conduct R. 1.02(a)(3) (“[A] lawyer shall abide by a client’s decisions . . . [i]n a criminal case . . . as to a plea to be entered”).

103. *Id.* R. 1.02(e) (emphasis added).

dissuade the client from doing so.¹⁰⁴ The fine points of the rule are difficult and overlain with defendants’ constitutional rights, but the basic rule is fairly clear.¹⁰⁵

The existence of the DRs does not mean every attorney is not and will never become a liar. They do provide disciplinary penalties that can range from private reprimands to disbarment for those who violate the ethical rules. Each issue of the State Bar’s official journal contains short reports of discipline administered by the organization or by a court to violators of the rules.¹⁰⁶ If all lawyers violated the system of ethical rules willy-nilly, the system could not function. While it does not work perfectly, the system does work in a reasonably adequate manner.¹⁰⁷

The existence of the State Bar of Texas’s ethical rules rebuts the allegation that admission to the practice of law is any sort of a license to lie. But has it always been so? I forged ahead with my research, reaching back into earlier ethical literature of the legal profession.

B. *In Historical American Legal-Ethical Texts*

Justice Samuel Alito wrote: “it’s difficult to talk about where we are now and where we are going without knowledge of the evolution of the ethical standards that presently govern us as lawyers.”¹⁰⁸ The Texas DRs of today are substantially based on the *Model Rules of Professional Conduct*, initially promulgated by the American Bar Association (ABA) in 1983¹⁰⁹ and

104. *Id.* R. 1.02(d).

105. See Bertrand C. Moser, *Client Perjury: The Lawyer’s Dilemma*, 29 S. TEX. L. REV. 263, 274 (1987) (discussing the interaction between a defendant’s constitutional rights and the rules attorneys must follow).

106. See, e.g., *Disciplinary Actions*, 79 TEX. B.J. 595, 642 (2016) (reporting an attorney as disbarred for committing egregious fraud while representing his client by collecting money from investors, commingling the investors’ funds with his own, and using the investment funds for his own benefit).

107. See MODEL RULES OF PROF’L CONDUCT preamble ¶ 12 (AM. BAR ASS’N 1983) (declaring it is a lawyers’ responsibility to follow the rules and aid in the self-regulation of the profession to ensure protection of public interest).

108. Samuel Alito, *Introduction to A CENTURY OF LEGAL ETHICS: TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS* xxix, xxix (Lawrence J. Fox et al. eds., 2009).

109. MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983). The history of American legal ethics from the ABA’s issuance of the Model Code in 1969 through fourteen years of formulation to the promulgation of the Model Rules in 1983, was a process Professor Michael Ariens described as “the elimination of guiding standards in favor of bright-line rules” and a transformation from a widespread sensibility that lawyers owe a duty to the public to the “law of lawyering.” Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 692, 733, 737 (2016) [hereinafter *The Last Hurrah*]. He explains and laments the change from “optimism in the American legal profession” and the “idea of the lawyer as a servant of the public” under the prior

adopted by order of the Supreme Court of Texas in 1989, effective January 1, 1990,¹¹⁰ under the name *Texas Disciplinary Rules of Professional Conduct*.¹¹¹ I recalled that those DRs were preceded by DRs based on the *Model Code of Professional Responsibility* that the ABA issued in August 1969,¹¹²

ethical regime to a “private market model of the lawyer’s duty of loyalty to the client” under the Model Rules. *Id.* at 691–92; *see also* Michael S. Ariens, *Sorting Legal: Specialization and the Privatization of the American Legal Profession*, 29 GEO. J. LEGAL ETHICS 579, 594–99 (2016) (re-emphasizing the obvious shift from a public interest focus to a “market” model relationship).

110. The State Bar of Texas began considering the Model Rules in 1984, but its membership required some modifications and the Texas Supreme Court did not adopt the rules, as adapted, until 1989. *The Last Hurrah*, *supra* note 109, at 691 n.12. As a result, the Texas ethical rules are stricter than the ABA’s recommended rules in a few respects, such as attorney advertising. *Compare* Tex. Disciplinary Rules Prof’l Conduct R. 7.07, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (outlining the requirements for a lawyer to obtain approval for public advertisements and solicitations), *with* ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 244 (1942) (finding a lawyer’s advertisement for a full-time position did not violate any ethics codes), *and* MODEL CODE OF PROF’L CONDUCT r. 7.1 (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”).

111. Tex. Disciplinary Rules Prof’l Conduct (1989), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (Vernon Supp. 1995) (Tex. State Bar R. art. X, § 9). Texas attorneys also practice in federal courts, which hold “inherent power to regulate the practice of counsel appearing before the [c]ourt[s].” *In re Fahey*, No. 09–00501, 2009 WL 2855728 at *5 (Bankr. S.D. Tex. Sept. 1, 2009); *see also* *Wright v. United States (In re Placid Oil Co.)*, 158 B.R. 404, 411 (Bankr. N.D. Tex. 1993) (holding a bankruptcy court maintained inherent authority to discipline attorneys practicing before the court); *Cunningham v. Ayers (In re Johnson)*, 921 F.2d 585, 586 (5th Cir. 1991) (finding a bankruptcy court had both “statutory and inherent authority to deny attorneys and others the privilege of practicing it”). “Fifth Circuit precedent requires the court to consider several relevant ethical standards in determining whether there has been an ethical violation.” *Galderma Lab., L.P. v. Actavis Mid Atl. LLC*, 927 F. Supp. 2d 390, 394 (N.D. Tex. 2013) (including both state and national ethical standards); *see also* *FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995) (stating “parties cannot be deprived of their right to counsel on the basis of local rules alone” (citation omitted)); *In re Am. Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992) (stating a trial court should first determine whether the attorney’s behavior prejudiced the client or “threatened interference with the fair administration of justice”); *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992) (indicating federal courts should also consider “the ethical rules announced by the national profession in the light of the public interest and the litigants’ rights”). Local rules of certain district courts explicitly adopt the ethical rules of the state:

(b) Grounds for Disciplinary Action. A presiding judge, after giving opportunity to show cause to the contrary, may take any appropriate disciplinary action against a member of the bar for: . . . unethical behavior; . . .

(e) Unethical Behavior. The term “unethical behavior,” as used in this rule, means conduct undertaken in or related to a civil action in this court that violates the *Texas Disciplinary Rules of Professional Conduct*.

N.D. Tex., Civ. R. 83.8 (emphasis added); *see generally* E.D. Tex., Civ. R. AT-2; S.D. Tex., Civ. R. 83.1, app’x. A; W.D. Tex., Civ. R. AT-7.

112. MODEL CODE OF PROF’L RESPONSIBILITY (AM. BAR ASS’N 1969). The ABA’s Model Code and Model Rules are simply models for adoption by the relevant authorities of the states. Interpretation of the ABA models provide guidance for application of state rules. Accordingly, “[s]ince 1983 almost all of the states have adopted some form of the ABA Model Rules. The others use a version of the Model Code. California is the only state that has never adopted either model and has its own rules of

which Texas adopted with some modification in 1973.¹¹³ My comparison of the Texas rules adopted in 1973 with those implemented in 1990 demonstrated that requirements regarding attorney honesty were previously more pithily stated, but clearly the essence has subsisted.

I continued researching in reverse chronological order. The Texas ethical standards preceding 1973 originated half a century earlier. In 1926, the Texas Bar Association, the predecessor of today’s State Bar of Texas,¹¹⁴ approved its original set of legal ethics for Texas attorneys, or at least applicable to those who were members of the voluntary association. The set of ethical precepts that the Texas Bar Association adopted at that time had been propounded by the ABA in 1908, in the *Canons of Professional Ethics*.¹¹⁵ The Texas Lawyers’ Association had been mulling the matter for almost two decades, having received the very first iteration of professional ethics at the time the ABA had promulgated them.¹¹⁶

It was between 1905 and 1908 that the ABA developed its Canons. “The traditional story” is that President Theodore Roosevelt, in a 1905 address at Harvard Law School, “criticized the legal profession for following the ethics of the marketplace instead of higher principles of morality.”¹¹⁷ He encouraged the bar to restrain unprofessional behavior and “to raise the standard of conduct for all lawyers.”¹¹⁸ The ABA spent two years studying, drafting, and seeking comments, and on August 27, 1908, the organization adopted the Canons of Professional Ethics.¹¹⁹ Review of the 1908 version discloses that, from the outset, the ABA Canons urged truthfulness in speech on the part of a lawyer and the element of *honesty* was central to

professional responsibility.” *Legal Ethics*, DUKE UNIV. SCH. OF L., J. MICHAEL GOODSON L. LIBR., <https://law.duke.edu/sites/default/files/lib/legaethics.pdf> (last modified Aug. 2015) [hereinafter *Legal Ethics*].

113. TEX. SUP. CT., RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (Code of Professional Responsibility) (1973).

114. The Texas Bar Association existed from 1882 to 1940, at which time it was more or less engrafted onto the judicial branch of state government by virtue of the 1939 State Bar Act. *See Creating the State Bar of Texas*, *supra* note 73, at 456–57 (reviewing the history leading up to the State Bar Act).

115. *Legal Ethics*, *supra* note 112.

116. As noted next, the ABA adopted its Canons in 1908; and a year later, in Texas, a committee recommended that the Texas Bar Association adopt them. A.H. McKnight, *Proceedings at the Independent Meeting of the Texas Bar Ass’n*, 4 TEX. L. REV. 161, 193–200 (1926). However, no vote was taken in 1909 or subsequently, and although some members thought that the Association had adopted the Canons, the Association did not in fact do so until 1926. *Id.*

117. Judith S. Kaye, *Keynote Address: ABA Canons of Professional Ethics Centennial*, 2008 J. PROF. LAW. 7, 8 (2008).

118. *Id.*

119. *Id.*

several key canons.

Canons 15 and 22 are particularly germane:

Canon 15. How Far a Lawyer May Go in Supporting a Client's Cause.

The office of attorney does not permit, much less does it demand of him for any client, . . . any manner of *fraud or chicane*.¹²⁰

Canon 22. Candor and Fairness.

The conduct of the lawyer before the Court and with other lawyers should be characterized by *candor* and fairness.

It is *not candid* or fair for the lawyer *knowingly to misquote* the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; . . . or in argument to assert as a fact that which has not been proved, or . . . to *mislead* his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than *candidly* with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes¹²¹

Other canons provide related, reinforcing mandates,¹²² and a catchall, Canon 32, expressed the ideal of legal professionalism—that is, service as agent for a principal—but tempered by responsibility to the legal system and to the public it serves: “[A]bove all a lawyer will find his highest honor in a

120. CANONS OF PROF'L ETHICS Canon 5 (AM. BAR ASS'N 1908) http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf (emphasis added).

121. *Id.* Canon 22 (emphasis added).

122. Such canons include:

Canon 18. Treatment of Witnesses and Litigants.

The client cannot be made the keeper of the lawyer's conscience in professional matters *Improper speech* is not excusable on the ground that it is what the client would say if speaking in his own behalf

Canon 29. Upholding the Honor of the Profession.

Lawyers should expose without fear or favor before the proper tribunals corrupt or *dishonest* conduct in the profession

Canon 41. Discovery of Imposition and Deception.

When a lawyer discovers that some *fraud or deception* has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

Id. Canons 18, 29, 41 (emphasis added).

deserved reputation for fidelity to private trust and to public duty, as an *honest* man and as a patriotic and loyal citizen."¹²³ The call for attorneys to conduct themselves under ethical principles that include honesty is clear.

Historians of the ABA Canons concur that the committee of its drafters "was not writing on a clean slate, but was building on nineteenth-century scholarship as well as ethics codes adopted by state bar associations."¹²⁴ Bar organizations in American states and cities date back to the decades after the Civil War, and one of those organizations, the Alabama Bar Association was the first one to adopt a set of legal ethics.¹²⁵ At the insistence of Judge Thomas Goode Jones, the Alabama Bar Association in 1880 adopted its set of ethical precepts and "much of Jones' material was adapted into [the American Bar] Association's Canons of Professional Ethics in 1908."¹²⁶ Those include obligations and precepts requiring or urging lawyers to be *honest* in their provision of legal services to clients.¹²⁷

I continued researching in reverse chronological order, looking earlier into the nineteenth century in search of texts that might illuminate the issue of lawyer honesty in the ages of Bierce and Bentham. Bar associations were few after the early Federal period and before the Civil War. Some states required honesty or honest character of men wishing to be admitted to the practice of law by action of the courts. But according to one scholar,

By the early 19th century, most states required only a general oath of office that did not state individual ethical principles This meant that lawyers were largely unregulated during the first half of the 19th century, at least in terms of formal standards of professional conduct.¹²⁸

Nonetheless there were, even then, pertinent ethical texts directed, and

123. *Id.* Canon 32.

124. Keith R. Fisher, *Repudiating the Holmesian "Bad Man" Through Contextual Ethical Reasoning: The Lawyer as a Steward*, 2008 J. PROF. L. 13, 16 (2008).

125. See generally Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 472 (1998) (asserting the widely-recognized primacy of Alabama's code of ethics, as it was "the first code of ethics for lawyers officially adopted in the United States").

126. David I. Durham, *A Call for the Regulation of the Profession*, in GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION 1, 4–5 (2003).

127. ALA. CODE OF ETHICS R. 5 (1887), reproduced in HENRY S. DRINKER, LEGAL ETHICS App. F at 354 (1953) ("The utmost *candor* and fairness should characterize the dealings of attorneys with the courts and with each other." (emphasis added)).

128. Carol Rice Andrews, *The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association*, in GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION 7, 11 (2003).

generally available, to attorneys.¹²⁹

One notable development that contributed to the developing professionalization over the course of the nineteenth century was the rise of case reporters and legal journals.¹³⁰ Commentators and jurists published lectures in those publications that, among other topics, promulgated maxims and exhortations specifically addressing and dealing with questions of lawyer ethics, including the obligation of a lawyer to be truthful.¹³¹

George Sharswood (1810–1833)¹³² was a key figure whose antebellum practice commentaries and ethical admonitions to young lawyers, including an insistence on honesty, had widespread influence and whose work subsequently inspired and informed the later promulgation of rules of legal ethics by the Alabama Bar and other bar organizations.¹³³ Sharswood was a Pennsylvania trial court judge, a professor of law at the University of Pennsylvania, and ultimately a chief justice of that state's supreme court.¹³⁴ In 1854, while a trial judge, he delivered lectures to the law students at that university, and those were collected and published under the title, *A Compend of Lectures on the Aims and Duties of the Profession of Law, Delivered Before the Law Class of the University of Pennsylvania*,¹³⁵ and republished several times in the following three decades.¹³⁶

Sharswood began his lectures with a recitation of the oath of admission to the practice of law in Pennsylvania, which, in a footnote, he traced back to an act of the colonial assembly in 1752.¹³⁷ The oath included, in pertinent part, the promise “to behave himself in the office of attorney

129. *See id.* at 7, 11 (“[A]cademics and prominent lawyers in the mid-19th century frequently expounded on the appropriate standards of conduct for lawyers.”).

130. *See* Richard A. Danner, *More than Decisions: Reviews of American Law Reports in the Pre-West Era*, DUKE L. SCHOLARSHIP REPOSITORY 2 (2015), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6172&context=faculty_scholarship (analyzing the history of early American reporters and specialized legal journals and their effect on the legal community).

131. *See* Andrews, *supra* note 128, at 12–13 (2003) (listing the topics covered by the academic discourses and law school lectures of David Hoffman and George Sharswood).

132. *Penn Biographies: George Sharswood (1810-1883)*, U. PA., http://www.archives.upenn.edu/people/1800s/sharswood_geo.html (last visited Dec. 19, 2016).

133. *See* Andrews, *supra* note 128, at 13 (2003) (suggesting George Sharswood's law school lecture was one of the most influential works during the mid-nineteenth century).

134. *See id.* (describing George Sharswood as “a ‘prominent lawyer, judge[,] and professor’”); *see also* *Penn Biographies*, *supra* note 132 (indicating Sharswood served as chief justice of the Supreme Court of Pennsylvania for ten years).

135. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF LAW* (1854) [hereinafter *A COMPEND OF LECTURES*].

136. GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (2d ed. 1860); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (3d ed. 1885).

137. *A COMPEND OF LECTURES*, *supra* note 135, at 10 (1854) (speaking of practices in the classroom).

according to the best of his learning and ability[;] . . . that he will *use no falsehood . . .*”¹³⁸ Sharswood explained “the claims of *truth* and honor [are among] the matters comprised in the [lawyer’s] oath of office.”¹³⁹ Later in the lecture Sharswood amplified his advice along that line:

It need hardly be added that a practitioner ought to be particularly cautious, in all his dealings with the court, to *use no deceit, imposition, or evasion—to make no statements of facts [that] he does not know or believe to be true—to distinguish carefully what lies in his own knowledge from what he has merely derived from his instructions—to present no paper books intentionally garbled.*¹⁴⁰ . . .

His advice regarding the admonition continued, stating: “*to use no falsehood[,]’ [i]t seems scarcely necessary to enforce this topic. Truth in all its simplicity—truth to the court, client, and adversary—should be indeed your polar star.*”¹⁴¹ Sharswood gave examples, and the lecture included this practical reason for an attorney to conduct himself honestly:

The client will be often required, in the course of a cause, to make affidavits of various kinds. There is no part of his business with his client, in which a lawyer should be more cautious, or even punctilious, than this. He should be careful *lest he incur the moral guilt of subornation of perjury*, if not the legal offence.¹⁴²

That is, the attorney will behave morally—and will avoid criminal liability—by being honest, according to Sharswood.¹⁴³ His published lectures were widely read and reprinted, as well as very influential.¹⁴⁴

138. *Id.* at 10 (emphasis added).

139. *Id.* (emphasis added).

140. *Id.* at 21–22 (emphasis added).

141. *Id.* at 94 (emphasis added).

142. *Id.* at 46–47 (emphasis added).

143. *See id.* at 47 (“He should be careful *lest he incur the moral guilt of subornation of perjury*, if not the legal offence.”).

144. In an 1855 review of the book, a reviewer noted:

The office of [p]residing [j]udge of the [d]istrict [c]ourt, for our great city, in which so large a mass of diversified business is constantly transacted, and where, in almost every possible manner, each member of the bar must present himself, affords the author[, Sharswood,] the opportunity . . . of perceiving every *failure in truth or rectitude*, and usually the motive of that failure and its character.

Review of SHARSWOOD’S PROFESSIONAL ETHICS, 3 AM. L. REG. 193, 193–94 (1855) (emphasis added) (book review). The reviewer commented “Sharswood’s book probably ‘places higher the ordinary standard of a lawyer’s rectitude.’” *Id.* at 195.

Among additional ethical commentators that have been identified by historians,¹⁴⁵ the other truly prominent nineteenth-century advocate for lawyerly ethics was David Hoffman (1784–1854).¹⁴⁶ He “founded the Law Institute at the University of Maryland” and authored the seminal book, *A Course of Legal Study*, the second edition of which (published in 1836) contained Hoffman’s pioneering effort to state maxims of ethical conduct for lawyers, his fifty “Resolutions in Regard to Professional Deportment.”¹⁴⁷ In his Resolutions, which have been called “the earliest statement in the United States of lawyers’ professional ethics,”¹⁴⁸ Hoffman advocated legal ethics based upon the lawyer’s own conscience:

My client’s conscience and my own are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go.¹⁴⁹

Other ethical considerations he sets forth include: (1) “*What is morally wrong cannot be professionally right*, however it may be sanctioned by time or custom”;¹⁵⁰ (2) “In reading to the court or to the jury authorities, records, documents, or other papers, I shall . . . *abstain from all false[] or deceptive readings*”;¹⁵¹ and (3) “[T]here can be no efficient eloquence, unless the speaker be an *honest man*.”¹⁵² The prescriptions set forth in Hoffman’s Resolutions¹⁵³ are less specific than Sharswood’s later lectures and focus more on a lawyer’s sense of honor¹⁵⁴ than on honesty. Hoffman optimistically concluded: “With the aid of the[se] . . . Resolutions . . . [a lawyer may] hope to attain eminence in my profession, and to leave this

145. Such others include David Dudley Field, progenitor of the Field Codes, and George Paul Brown, the foremost antebellum criminal lawyer of Philadelphia, together lesser known lecturers to lawyers and law students and even funeral orators. Michael H. Hoeflich, *Preface* to SOURCES OF THE HISTORY OF THE AMERICAN LAW OF LAWYERING at xi, xii–xiv (Michael H. Hoeflich ed., 2007).

146. Andrews, *supra* note 128, at 11–12 (2003); Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571, 571 (2014)) [hereinafter *Lost and Found*].

147. *Lost and Found*, *supra* note 146 at 571–72.

148. THE OXFORD COMPANION TO AMERICAN LAW 277 (Kermit L. Hall et al. eds., 2002).

149. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY, 755 (1836).

150. *Id.* at 765 (emphasis added).

151. *Id.* at 769–70 (emphasis added).

152. *Id.* at 740.

153. For a Hoffman contemporary who followed soon with similar thoughts, *see generally* Timothy Walker, *Ways and Means of Professional Success*, 1 W. L.J. 542, 546–47 (1844).

154. *See Lost and Found*, *supra* note 146 at 571–72 (analyzing how the concept of honor may have played a role in Hoffman being lost through history and subsequently rediscovered by American lawyers and legal scholars).

world with the merited reputation of having lived an *honest lawyer*.”¹⁵⁵

The upshot of my historical research was to find that, around the time of Bierce’s penning *To an Insolent Attorney*, at least the key national bar organization, the ABA, although representing only a minority of American lawyers, firmly took a position decrying dishonesty by lawyers. And at the approximate time Bentham was criticizing certain British lawyers as “licensed liars,” Sharswood and Hoffman were articulating standards of honesty for American lawyers, and a little later, the Alabama Bar Association was adopting the first code of ethics by a lawyers’ organization.¹⁵⁶ Thus, even in the nineteenth century, lawyers were subject to, and at least to certain extents constrained by, the admonitions and maxims—expressing norms of lawyer conduct—posited by important commentators, as well as by oaths taken upon admission to the bar, to be honest and not to mislead courts, opponents, or clients.

C. *In Abraham Lincoln’s “Honest Lawyer” Speech and in His Last Case*

At that point in my research, a friend pointed me to the law practice of that paragon of an American lawyer, Abraham Lincoln,¹⁵⁷ and another friend provided an excerpt from a famous speech by him. As a practicing lawyer, Lincoln had to deal with the antebellum public’s misperceptions and prejudices about lawyers and their honesty.¹⁵⁸ In a Lincoln-authored document titled “*Notes on the Practice of Law*,” which seems to be the text of a speech from as early as 1850 or as late as 1859,¹⁵⁹ Lincoln exhorted law students and prospective lawyers:

There is a vague popular belief that lawyers are *necessarily dishonest*. I say vague, because when we consider to what extent confidence, and honors are reposed

155. 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY*, n. 100 at 775 (1836); *see generally* THOMAS L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* (1991) (stressing the importance of ethics to a lawyer that strives to achieve success and prominence in the legal field); Alito, *supra* note 108, at xxx–xxxii (discussing the importance of the works of David Hoffman and George Sharswood to the “emerging field of legal education” in the 1800s).

156. CANONS OF PROF’L ETHICS (AM. BAR ASS’N 1908) http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpe/Canons_Ethics.authcheckdam.pdf (last visited Dec. 19, 2016).

157. William T. Ellis & Billie J. Ellis, Jr., *Competence, Diligence, and Getting Paid: Lincoln’s Lessons for Today’s Ethical Lawyer*, in *ABRAHAM LINCOLN, ESQ.: THE LEGAL CAREER OF AMERICA’S GREATEST PRESIDENT 133* (Roger Billings & Frank J. Williams eds.).

158. FRANK CERESI, *ABRAHAM LINCOLN’S LAW PRACTICE 116* (2012) (ebook) (discussing the public’s perceptions of lawyers and how Lincoln dealt with them).

159. *Id.* at 69.

in, and conferred upon lawyers by the people, it appears improbable that their *impression of dishonesty* is very distinct and vivid. Yet the impression is common—almost universal. Let no young man, choosing the law for a calling, for a moment yield to this popular belief. *Resolve to be honest at all events; and if, in your own judgment, you can not be an honest lawyer, resolve to be honest without being a lawyer.* Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.¹⁶⁰

This “honest lawyer’s passage,” according to Brian Dirck, a recent biographer who focused particularly on Lincoln’s legal career, “ties Lawyer Lincoln directly to Honest Abe, the man whose integrity has become the stuff of American legend.”¹⁶¹ Another recent biographer comments, “Lincoln’s reputation for honesty is well deserved,”¹⁶² and a third calls him “America’s secular saint.”¹⁶³ These words of Lincoln’s speech have often been held up as an inspirational legal-ethical text¹⁶⁴ and are frequently repeated by writers on topics of legal ethics.¹⁶⁵ I was tempted to end this Article here.

But in researching the Lincoln speech further, I found that his biographers and the legal-ethicists have overlooked one problematic case, or actually a series of cases in which Lincoln was counsel, or a member of a counsel group, occurring at the very end of his legal career, just before his nomination and election as President.¹⁶⁶ A lawyer and legal historian, Marshall D. Hier, discovered this litigation in federal court in Illinois and related proceedings in Illinois state courts. In several historical archives, he

160. Abraham Lincoln, “Notes on the Practice of Law,” *quoted in* THE PORTABLE ABRAHAM LINCOLN 35 (Andrew Delbanco ed., 1992).

161. Brian Dirck, *Introduction to LINCOLN THE LAWYER* at 1, 2 (2007).

162. JONATHAN W. WHITE, *LINCOLN ON LAW, LEADERSHIP, AND LIFE* 18 (2015).

163. Harold Holzer, *Reassessing Lincoln’s Legal Career*, in *ABRAHAM LINCOLN, ESQ.: THE LEGAL CAREER OF AMERICA’S GREATEST PRESIDENT* (Roger Billings & Frank J. Williams eds. 2010); *see also* JOHN P. FRANK, *LINCOLN AS A LAWYER* 140 (1961) (“Lincoln the lawyer and Lincoln the candidate were in the highest degree the same man.”); Christopher Neff, *Those Cunning Spiders, the Lawyers: In Search of an Antebellum Legal Ethos*, 33 J. LEGAL PROF. 317, 318 n.7 (2009) (“A perfected Lincoln is still held up as the ideal to which statesmen (and lawyers) should aspire.” (citations omitted)).

164. Frank Ceresi, editor of an edition of Lincoln’s speech, wrote in its introduction:

[M]y opinion is that the Notes should not only hang proudly in every lawyer’s law office, but they should be required reading during the third year of every law school curriculum across the land . . . it should be the foundation of a course, right alongside . . . ethics, and studied for the nuggets that it reveals.

FRANK CERESI, *ABRAHAM LINCOLN’S LAW NOTES*, 74 (2012) (ebook).

165. Searches through Google Scholar and HeinOnline demonstrate that this quotation has been featured in more than 180 law review articles.

166. Marshall D. Hier, “*Honest Abe*”? *Lincoln’s Legal Ethics in Blakeman v. Phelps*, 45 ST. LOUIS B.J. 48 (1998–1999) (outlining the series of events in which Lincoln became involved in the case).

found the revelatory correspondence among Lincoln and other Illinois lawyers who teamed in defending stockholders of a defunct railroad company against the claims of out-of-state creditors.¹⁶⁷

In his 1998 article, Hier asserted that Lincoln did not live up to his own admonishment of honesty in legal practice, as he engaged, in this instance:

[V]ery questionable . . . maneuvers to thwart [the plaintiff]. Easily the most questionable of these maneuvers involved the deliberate misrepresentation in pleadings filed with the Illinois Supreme Court of the existence of a key lower court judgment, whereas neither that judgment nor the case in which it allegedly had been rendered had any basis in fact.¹⁶⁸

With the lawyers’ correspondence, he pieced together the story of the lawyering of this somewhat complicated matter.

To begin, a St. Louis attorney, Daniel Jewett, represented a creditor of the railroad in a diversity-of-citizenship action in the federal circuit court in Illinois to collect an unpaid debt from one of the subscribing stockholders.¹⁶⁹ Lincoln defended, but Jewett won this suit.¹⁷⁰ Since the amount was too small to support an appeal to the U.S. Supreme Court, other counsel associated with Lincoln in the defense of the stockholders urged him to file a motion for a new trial in order to obtain a retrial and to buy time for a legal gambit.¹⁷¹

Concocted by the other attorneys, the strategy hinged on Lincoln filing an appeal to the Illinois Supreme Court regarding another judgment—a state court judgment entered in Madison County in a suit brought by one of the stockholders against another “to collect a judgment [rendered in a different county, Bond County] for \$110.00 supposedly rendered in favor of [the plaintiff] against the railroad . . . for his services in soliciting railroad stock subscription.”¹⁷² Lincoln’s participation in a false representation to a court is revealed in a letter from an ally of the group of railroad stockholders informing Lincoln that the ostensible plaintiff “had *not* previously sued the Company [in Bond County] *but it was admitted* that he had.”¹⁷³ Letters from the associated lawyers informed Lincoln that the

167. *Id.* at 49.

168. *Id.* at 48.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 49.

173. *Id.* (emphasis added).

strategy was for the new defendant to quickly confess a judgment in a state court in Madison County based on the fictitious prior judgment.¹⁷⁴ Lincoln could then appeal it and, hopefully, secure a fast and favorable opinion of the state supreme court to cite to the federal court in which Lincoln's motion for rehearing was pending.¹⁷⁵

The Madison County trial court granted the judgment as requested by Lincoln's co-counsel based on the "convenient fiction" of an earlier judgment in the Bond County state court.¹⁷⁶ When Lincoln then appealed the judgment, Jewett, the attorney for the winning plaintiff in the federal court action, learned what was happening and filed an amicus brief in the Illinois Supreme Court, pointing out that the supposed underlying judgment in Bond County was fictitious.¹⁷⁷ But the state supreme court nonetheless overruled Jewett's request to dismiss the case.¹⁷⁸ At this point, Lincoln's name disappeared from the papers of the case, as he moved into the political realm, and the appellate case was later settled, which Hier presumes was also "fictitious."¹⁷⁹

Hier contends that "Lincoln's willingness," after having urged all lawyers to be "honest at all events" in his "honest lawyer" speech, "necessarily raises the issue of Lincoln's own honesty as a lawyer."¹⁸⁰ Hier concludes "[t]he best argument that can be advanced in defense of Lincoln's actions . . . is the fact that the Illinois Supreme Court, after considering [the] powerful arguments [that the appealed-from judgment was a ruse], still overruled the . . . motion to dismiss."¹⁸¹ But in light of Lincoln's "own high standard for attorney honesty in" the "honest lawyer" speech Hier concludes, somewhat reluctantly, "Lincoln seems to have fallen short."¹⁸²

174. *See id.* (reciting David Gillespie's letter to Lincoln).

175. *Id.*

176. *Id.*

177. *Id.* at 50.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* Whether Lincoln's involvement in *Phelps v. Blakeman* was the result of situational pressures or a simple human failing cannot be answered here. One Lincoln biographer does note: "Like other members of the bar, Lincoln could ill-afford to be finicky about clients; there were simply too many lawyers and too few clients." 1 MICHAEL BURLINGAME, ABRAHAM LINCOLN: A LIFE 253 (2008). Of course, we should be mindful that "the past is a foreign country." DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY: REVISITED 3 (1985) (using the opening line of the novel THE GO-BETWEEN: "The past is a foreign country: they do things differently there." (quoting L.P. HARTLEY, THE GO-BETWEEN 17 (1953))). As a historian has cautioned, "[L]ife back then was based on ways of being and believing incommensurable with our own." LOWENTHAL, *supra*, at xiv (1985).

V. UNDERSTANDING THE ETHICAL REQUIREMENT OF ATTORNEY
HONESTY

A. *Lawyering Within the Ethical Requirement of Lawyer Truthfulness in the
Twenty-First Century*

My research ended on the sour note of learning of Lincoln’s involvement in a false pretense upon which a court acted in reliance. It was a reminder that, of course, some lawyers *do* lie from time to time in their practice on behalf of clients.¹⁸³ As two astute commentators have observed:

Surely some attorneys do deliberately engage in conduct that they know to be wrong in order to benefit themselves or their client. However, psychological research suggests a more complex story: that those who commit ethical infractions are not necessarily “bad apples,” but are human beings. Many ethical lapses result from a combination of situational pressures and all too human modes of thinking.¹⁸⁴

I had otherwise reached the conclusion that the phrase “licensed liar” is an unjustified epithet, an allegation that is just wrong. American lawyering, today as well as at the time of Bentham, Lincoln, and Bierce, occurs within limits, with the boundaries set by, today, the ethical rules of the jurisdictions in which a licensed attorney practices or, in the nineteenth century, within the parameters of the maxims, admonitions, precepts, and aspirations articulated by significant jurists and legal commentators, including Lincoln, as well as by the governance of court proceedings by judges, all imposing or fostering an imperative to speak truthfully, to be honest, and not to intentionally mislead courts, opponents, or clients.

The fuller conclusion is this: despite legal ethics, individual attorneys can and do, on occasion, transgress the rules by lying on behalf of clients, and some may lie to their clients, but such conduct is *not* with the permission or sanction of any sort or form of professional authorization. A licensed

183. See Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB POL’Y 209, 217 (2014) (“I don’t see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client A lawyer is required to be disingenuous.” (quoting Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951))). This is also true of course in the private lives of some lawyers. See Mark E. Wojcik, *Lawyers Who Lie On-Line: How Should the Legal Profession Respond to eBay Ethics?*, 18 J. MARSHALL J. COMPUTER & INFO. L. 875, 876 (2000) (providing background on a situation in which a lawyer attempted to sell a fraudulent painting for his own benefit).

184. Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1111 (2013).

attorney is simply *not authorized or permitted* by the licensing agencies and the state and federal courts to lie to clients, adversaries, or courts. And if those professional standards are breached, penalties are at least potentially assessable.

As noted earlier, “lawyering” is the work of the lawyer to

invoke[] and manipulate[], or advise[] about, the dispute-resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in, or preserving, the status quo for his or her [client].¹⁸⁵

Lawyering, under this definition, is the work of an attorney to find a way to achieve the goal desired by the client. Lawyering is difficult work. Clients hire lawyers to obtain *a result* that the clients desire.¹⁸⁶ Usually, clients do not hire lawyers based on the lawyer’s personal morality—whether his morality is based on religion or philosophy—but rather based on the expectation that the lawyer is capable of achieving the *objective of the client*. Most clients do not generally care if the lawyer breaks minor procedural rules¹⁸⁷ or lives up to a moral standard in her personal life, so long as the goal of the client is attained. The lawyer operates and lives within a set of tensions created by the client’s expectations, the popular conception of the lawyer encapsulated in the phrase “licensed liar,” and the reality of the constraints of professional ethical rules about honesty¹⁸⁸—violations of

185. Daniel, *supra* note 32, at 215; *see also* *Lawyering*, BLACK’S LAW DICTIONARY (10th ed. 2014) (explaining the meaning of the word “lawyering” as it relates to the work and skill needed in the field).

186. There is, for only one example, “cause lawyering,” in which the lawyer finds or takes on a client in pursuit of a broader social or political goal, where “primary loyalty is [often] not to clients, to constitutional rights, nor to legal process but to a vision of the good society.” CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 7 (Austin Sarat & Stuart Scheingold eds., 1998); Felice Batlan, *The Ladies’ Health Protective Association: Lay Lawyers and Urban Cause Lawyering*, 41 AKRON L. REV. 701, 705 (2008).

187. Legal ethics do not now and have not, by my research, ever required that a lawyer refrain from bending or occasionally breaking nonsubstantive or procedural rules from time to time in pursuit of the goal of the client. I have written of a classic example in *LBJ v. Coke Stevenson* whereby Johnson’s lawyers ignored the rules for seeking Supreme Court review and bluffed a clerk into accepting their filing. *See* Josiah M. Daniel, III, *LBJ v. Coke Stevenson: Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948*, 31 REV. LITIG. 1, 54 (2012) (recounting an instance of a lawyer disregarding the rules by ignoring the deputy clerk’s protests that he could not accept a motion to stay, and “toss[ing] the motion on the desk, stat[ing] that he was ‘effectuating a lodgment,’ depart[ing], and wait[ing] to see what happened”). It may or may not be a good idea tactically to breach one of the rules of procedure, but those rules or associated case law themselves provide or illustrate remedies, and it is neither necessary nor appropriate to allege attorney dishonesty when for tactical reasons a lawyer bends one of them.

188. *See* DAVIS, *supra* note 37, at 9 (using the phrase “licensed liar” to describe attorneys). An excellent practical guide to the varieties of issues of honesty and specific solutions and approaches to

which can have real, painful consequences.

Legal scholars continue to debate the normative role of disciplinary rules.¹⁸⁹ “Lawyers make ethical decisions primarily based on two considerations: a cost-benefit analysis or an individualistic moral basis,” writes one law student.¹⁹⁰ Yet whether the lawyer is acting as a “neutral partisan”¹⁹¹ or is pursuing client representation based on the attorney’s own personal moral code,¹⁹² and even though the ethical rules “remain a mixture of hortatory and concrete mandates, some never enforced, most rarely enforced, and none universally enforced,”¹⁹³ if an attorney strays outside the boundaries of the rules by lying, he risks subjecting himself to the imposition of professional discipline by the organized bar’s enforcement apparatus.¹⁹⁴ As Samuel Dash has written,

them is Peter C. Manson, *The Importance of Being Honest (with Some Rules on How To Stay that Way)*, 34 PRAC. LAW. 75 (1988).

189. See Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 643–44 (1981) (discussing the interplay between the rules of professional conduct and a lawyer’s own morality); see also Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 ST. MARY’S J. LEGAL MAL. & ETHICS 134, 174–77 (2014) (tracing the ABA’s adoption of a Code of Professional Responsibility and then its rejection and replacement with the Model Rules of Professional Conduct in the wake of Watergate); Yuzhe Zhao, *Current Development, Rules, Morality, and Legal Ethics: Searching for the Underlying Principle of Lawyer Regulation*, 25 GEO. J. LEGAL ETHICS 857, 857 (2012) (commenting on the importance of the debate and the impact it has on practitioners).

190. Zhao, *supra* note 189, at 857.

191. See William H. Simon, *Commentary, The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36 (1978) (asserting the “neutral partisan” conception of the lawyer’s role means “the lawyer will employ means on behalf of his client which he would not consider proper in a non-professional context even to advance his own ends” and neutrality arises from the idea that lawyers are “expected to represent people who seek [their] help regardless of [the lawyer’s] opinion of the justice of [the client’s] ends”).

192. See *id.* at 31–32 (“Some of this literature argues that lawyers compromise their clients’ interests in order to advance their own interests.”); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 56 (1988) (contending lawyers seek to excuse their behavior by appealing to their role in a social institution—in this case the adversary system—yet “[t]he principle of nonaccountability . . . is false, and the principle of partisanship holds only . . . when lawyers are held morally accountable for the means they use and the ends they pursue”).

193. Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671, 672 (2010).

194. See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 223–24 (1993) (“The recent adoption of the ABA’s Modern Rules has been followed with a series of further proposals designed to control specific lawyer conduct.”). For instance, one Texas lawyer was suspended from practice for five years due to his actions:

[He] falsified evidence and knowingly used evidence that he knew to be false, delayed the resolution of a legal matter, committed a criminal act, and engaged in conduct involving dishonesty, deceit, or misrepresentation . . . [and] violated Rules 1.01(b)(1), 1.02(a)(2), 1.03(a) and (b), 1.04(d), 1.15(a)(3), 3.02, 3.03(a)(5), 3.04(b), and 8.04(a)(2) and (a)(3). He was ordered to pay

All lawyers should have integrity, should be honest and should not misrepresent. The rules of professional conduct mandate that lawyers have such integrity. But that isn't based on moral standards, it's based on prohibitions that are backed up by legal and professional sanctions¹⁹⁵

The overriding, fundamental reality is that prevarication by practicing attorneys is simply not permitted by the rules, including the mandate for honesty, and violations do, or can, have consequences. The guiding and controlling element of professional ethics prohibits and inhibits an attorney from lying in her work for the client.

The public has difficulty understanding these matters including the subtleties of bar rules¹⁹⁶ and frequently leaps to the worst conclusion.¹⁹⁷ Marc Galanter analyzed a plethora of popular stories and jokes—old and new—about lawyers and found that many “play[] on the similarity of the sounds of ‘liar’ and ‘lawyer.’”¹⁹⁸ Similarly, legal historian Lawrence M. Friedman noted:

The general public certainly has no illusions about the profession. Indeed, quite the contrary: according to survey data, people have a very low opinion of lawyers. A December 2006 Gallup poll asked people to rate the “honesty and ethical standards” of different occupations. Eighty-four percent of the respondents rated nurses “high or very high,” and dentists received 62 percent. Lawyers, by contrast, received a dismal 18 percent. In a Harris poll that asked *whether various types of people could be trusted to “tell the truth,” lawyers did even worse; at 27 percent, they were at the very bottom of the list, outranking only actors at 26 percent.*¹⁹⁹

\$21,868.20 in attorney's fees and costs.

Disciplinary Actions, Suspensions, 73 TEX. B.J. 725, 780 (2010). Another was disbarred because he “engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . [in] violat[ion of] Rules 3.01, 3.02, 3.03(a)(1), and 8.04(a)(3).” *Disciplinary Actions, Disbarments*, 77 TEX. B.J. 988, 989 (2014). The Texas Board of Disciplinary Appeals makes available “[i]nformation and copies of [actual] orders . . . at www.txboda.org.” *Disciplinary Actions, Disbarments*, 77 TEX. B.J. 988, 988 (2014).

195. Samuel Dash, *Legal Ethics and Morality: Can a Legally Ethical Lawyer Be a Moral Person?*, FRANK G. RAICHLER LECTURE SERIES ON L. IN SOC'Y 209, 214 (1999).

196. This is not to gainsay the failures and inadequacies of the legal system, which is far, far from perfect.

197. See Thomas Ross, *Knowing No Other Duty: Privity, the Myth of Elitism, and the Transformation of the Legal Profession*, 32 WAKE FOREST L. REV. 819, 837 (1997) (“Controversy, popular dislike, and dissatisfaction with particular instances of lawyering have always characterized the popular response to the legal profession.”).

198. MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 31 (2005).

199. Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 WM. & MARY L. REV. 1153, 1155 (2009) (emphasis added) (footnotes omitted).

Thus the popular mind continues to believe what the stranger at the bar alleged in his two words: that lawyers are indeed “licensed liars” who willingly prevaricate in the service of clients in order to make fees. This popular prejudice does exist; as Lincoln noted, “the impression is common, almost universal.”²⁰⁰

B. *Replying to the Stranger in the Bar*

I have chosen to be a lawyer, and after thirty-eight years in the practice of law, I continue to subscribe to the professional ethic of honesty in my work on behalf of clients. Lincoln’s *aspirational* “honest lawyer” speech—not his conduct on behalf of clients in the *Blakeman v. Phelps* case—furnishes my answer to the stranger in the bar in Santa Fe. I know that my client expects and desires my best lawyering in order to obtain a good and valuable result. But good lawyering should never be dishonest.

While from time to time specific practitioners cross the line and violate the ethic of honesty, the phrase “licensed liar” is just an epithet. When it is uttered in reference to the entirety of the American bar or to an individual lawyer whom the speaker characterizes an undifferentiated representative of that entirety, that epithet is unwarranted.

200. ABRAHAM LINCOLN, SPEECHES AND LETTERS BY ABRAHAM LINCOLN 25 (Merwin Roe ed., 1949).