WHOM DO YOU TRUST? LYING, TRUTH TELLING, AND THE QUESTION OF ENFORCEMENT

Bruce P. Frohnen * & Brian D. Eck**

Lawyers, like all other people, lie; we intentionally lead people to believe things we know are not true.¹ Indeed, as Hannah Arendt pointed out, there is a sense in which lying comes naturally to all of us because human action itself, like lying, rests on the ability to imagine that things might be different than how they actually are.² At least up to a point, lying is both easy and tempting; it never comes into conflict with our reason because things could have been as the liar contends and one may come up with a lie that sounds more plausible than the facts themselves.³ Thus we all, lawyers and non-lawyers, have the capacity and temptation to lie. Unlike most other people, however, lawyers are subject to discipline for lying.⁴ Moreover, dishonesty among lawyers is perceived as problematic enough to merit investigation into its frequency and causes.⁵ Lawyers have a reputation among the public for being

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¹ Sisella Bok, Lying: Moral Choice in Public and Private Life 13 (1978)
² Id. at 6.
³ See, e.g., Model Rules of Prof'L Conduct R. 8.4(c) (2007), which states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation,” and Model Rules of Prof'L Conduct R. 4.1(a) (2007), stating that “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”
⁴ See, e.g., Lisa G. Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659 (1990) (showing the financial and professional pressure for lawyers to lie to clients regarding billing and the frequency with which it occurs); David J. Dance, Pretexting: A Necessary Means to a Necessary End?, 56 Drake L. Rev. 791 (2008) (arguing that exceptions to professional rules against dishonesty for the use of pretexts to gain private information foster unethical conduct); Austin Sarat, Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation, 67 Fordham L. Rev. 809 (1998) (reporting judges' and lawyers' narratives concerning the pressures of business and professionalism within civil
particularly dishonest. This ambiguity regarding lawyer dishonesty is deepened by arguments justifying attorney lies in a variety of circumstances. We think this ambiguity is a problem for lawyers, the legal profession, and the legal system that can and must be addressed.

This Article begins by asking whether the legal profession does, in fact, view lying as a serious offense. To answer this question, we use empirical evidence to test the hypothesis that state bar discipline committees do not clearly recognize a norm against lying qua lying. By "a norm against lying qua lying" we mean a standard against lying in and of itself (i.e. separate and apart from any particular, immediate impact of the lie) that is enforced through relatively serious professional sanctions. We state, then, a negative form of a norm of truth-telling that accords with our emphasis on official, institutional sanction. We look at empirical evidence of actual sanctions to push debate beyond any vague lament over the existence of deceit to a discussion of why the profession should enforce a norm against it.

As we show, the data indicates that state bar discipline boards recognize no norm against lying qua lying. We next outline two principle reasons why this is so: first, because of the assumption that deception by lawyers is bad only when and to the extent that it brings measurable bad results and, second, because of the belief that some forms of lying are not "really" lying because the recipients of the deception have no rational expectation of veracity—either because of the circumstances of the communication or because of their own position and/or misconduct. After critiquing these arguments and showing them to be unpersuasive, we note a final argument against institutional enforcement of a norm against lying: that the existence of certain inherent problems with detection, enforcement, and punishment

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6. According to Gallup polls, only 18% of people surveyed rated lawyers' honesty and ethical standards as "high" or "very high." Lawyers came in just behind journalists (25%), bankers (23%), and building contractors (22%), and just ahead of real estate agents (17%), labor union leaders (16%), stockbrokers (12%), Congressmen (12%), and business executives (12%). The Gallup Organization, Honesty/Ethics in Professions (2008), http://www.gallup.com/poll/1654/Honesty-Ethics-Professions.aspx (last visited Jan. 4, 2008).

7. See, e.g., James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 AM. B. FOUND. RES. J. 926 (1980) (arguing that in a variety of circumstances lawyers lie because it is necessary for their clients' interests); Monroe H. Freedman, In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct, 34 HOFSTRA L. REV. 771 (2006) (asserting that it is the duty of lawyers to lie in several circumstances when the clients' interests demand it).
regarding certain kinds of lying render such a norm unenforceable. Finally, we contend that this final argument, while powerful, should not deter the profession from enforcing the norm of truth telling through less formal, institutional means, and we outline some promising attempts at resuscitating social networks capable of such enforcement.

I. THERE IS NO NORM AGAINST LYING: THE DATA

Our hypothesis is that there is no professional norm against lying qua lying. For this hypothesis to be true, the data would have to show that when lying is punished by the bar it generally involves independent, aggravating offenses (such as stealing from a client’s trust account), and that cases in which the bar punishes lies unaccompanied by such aggravating offenses usually involve a violation of the duty of candor to the tribunal itself.\(^8\) Thus, lies to private parties will make up only a small fraction of the total cases involving lies and will be punished relatively lightly by the bar, if at all.

We examined disciplinary notices from states that follow the Model Rules of Professional Conduct and publish their disciplinary notices on the LEXIS-NEXIS database.\(^9\) We did not consider significant bars that retain their own version of the Code.\(^10\) The data consisted of notices from twenty-five states between 1994 and 2007. Specifically, we used a LEXIS search of bar journals to find each instance where a published discipline notice cited either of two Rules that target falsehood: 8.4(c)\(^11\) and 4.1(a).\(^12\) We found 258 quantifiable instances of discipline involving some form of dishonesty. The published instances were divided into categories by punishment (censure, probation or suspension,

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8. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2007) (stating that “a lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer”).

9. Specifically, we surveyed the bar journals from Alabama, Alaska, Arkansas, Arizona, Tennessee, Hawaii, Utah, Texas, Oregon, Nevada, Michigan, Massachusetts, Delaware, Florida, Missouri, Louisiana, Maine, Montana, Pennsylvania, Rhode Island, South Carolina, Vermont, and New Hampshire.


11. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2007) states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

12. MODEL RULES OF PROF’L CONDUCT R. 4.1(a) (2007) states that “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”
and disbarment\textsuperscript{13} and broken down into sub-categories based on \textit{to whom} the lie was told (e.g., lying to a third party, the tribunal, or a client). The particular circumstances of each discipline notice were tallied, and the prevalence of each offense was calculated. Since it quickly became clear that the majority of published cases involved "aggravating factors"\textsuperscript{14} (such as misappropriation of trust funds, neglecting casework, and the like) that contributed to the punishment, those factors also were separated as above. The particular aggravating circumstances of each discipline notice were also tallied.

Finally, specific cases that demonstrated lying as an independent variable were noted in detail. First, cases where the discipline notice cited falsehood(s) independent of any aggravating factor (e.g. the attorney simply lied or the attorney lied and as a separate matter assaulted opposing counsel) were analyzed to determine the effect such factors had on the severity of punishment. That is, such cases were examined to see if a norm against lying in itself exists and under what circumstances it is enforced. Second, cases where only aggravating factors were present were noted to determine when the bar invokes Rule 8.4(c) or 4.1(a) despite the absence of a direct lie—that is, to see what independent meaning the bar gives to the relevant statutory version of the Model Rules against lying.

The data were separated by offense into two broad categories: lies and aggravating factors. Lies were separated into one of six sub-categories: lying to clients, lying to the opposing party, lying to the court, lying to another official, lying to a third party, and unspecified misrepresentation. Lying to clients included cases where the attorney lied to his or her client about the status of a pending case.\textsuperscript{15} Lying to the opposing party included failing to file or filing false answers to interrogatories as well as direct lies during the course of representing a client's case.\textsuperscript{16} Lying to a third party included lying to potential defendants,\textsuperscript{17} to the public at large via advertising,\textsuperscript{18} and to

\begin{itemize}
  \item [13.] Disbarment includes cases of reciprocal discipline in which the committee noted an attorney's conduct would have warranted disbarment had the attorney been a member of the authority's bar.
  \item [14.] This study defines the term in a specific sense that is not necessarily related to the aggravating factors that bar disciplinary committees consider when meting out punishment; here, it refers to certain categories of misconduct elaborated below.
  \item [15.] \textit{See, e.g.}, Lawyer Regulation, ARIZ. ATT'Y, Jan. 2003, at 39, 45-47.
  \item [16.] \textit{See, e.g.}, Attorney Discipline, ALASKA B. RAG, Apr.-June 2005, at 35, 35.
  \item [17.] \textit{See, e.g.}, Discipline, OR. ST. B. BULL., Dec. 2000, at 39, 40-41.
  \item [18.] \textit{See, e.g.}, Lawyer Regulation, ARIZ. ATT'Y, Mar. 2004, at 65, 66.
\end{itemize}
unrepresented parties,\textsuperscript{19} as well as misleading use of letterhead.\textsuperscript{20} Lying to the court included filing false affidavits or notarized documents,\textsuperscript{21} practicing while suspended or while not admitted pro hac vice,\textsuperscript{22} introducing false or misleading evidence,\textsuperscript{23} and filing a false fee declaration,\textsuperscript{24} as well as directly lying to the judge or advising a client to lie to the judge.\textsuperscript{25} Lying to another official included lying to or stonewalling law enforcement agencies\textsuperscript{26} and the bar (including when applying for admittance).\textsuperscript{27} Unspecified dishonesty included instances where the reporter did not elaborate on the nature of the misconduct, or where the rules were specifically mentioned but the nature of the lie was not explicit in the narrative.\textsuperscript{28}

Aggravating offenses were also separated into one of six subcategories: misappropriation, neglect or abandonment, insufficient communication, abusing client relations, abusing the justice system or opposing counsel, and illegal conduct. Misappropriation included negligent mishandling or conscious pilferage of trust or probate accounts,\textsuperscript{29} as well as outright theft from the proceeds of an award or judgment.\textsuperscript{30} Neglect or abandonment included failure to file or pursue cases after accepting the client,\textsuperscript{31} as well as deliberately leaving clients without representation by closing shop or vacating the jurisdiction without adequate notification or substitution of counsel.\textsuperscript{32} Insufficient communication included failure to ensure informed consent,\textsuperscript{33} as well as outright avoidance.\textsuperscript{34} Abusing client relations included failing to abide by a client’s wishes regarding the outcome of litigation,\textsuperscript{35} failing to
refund a retainer or return files,\textsuperscript{36} revealing or using privileged information,\textsuperscript{37} taking a conflicting or pecuniary interest in a case,\textsuperscript{38} charging excessive or improper fees,\textsuperscript{39} and pursuing an improper sexual relationship with a client.\textsuperscript{40} Abusing the justice system or opposing counsel included ex parte communication with another attorney's client or a member of the court,\textsuperscript{41} filing a meritless or harassing suit,\textsuperscript{42} paying a witness for testimony,\textsuperscript{43} charging a fee from an appointed client,\textsuperscript{44} verbally or physically abusing the judge or opposing counsel,\textsuperscript{45} pursuing a sexual relationship with the judge,\textsuperscript{46} and interfering with opposing counsel in some way other than a direct lie (e.g., surreptitious tape recording).\textsuperscript{47} Illegal conduct included engaging in or advising the violation of a law (e.g., circumventing Customs restrictions)\textsuperscript{48} and engaging in or advising contempt of a court order.\textsuperscript{49}

\begin{itemize}
  \item \textsuperscript{36} See, e.g., Unparalleled, supra note 29, at 16.
  \item \textsuperscript{37} See, e.g., Lawyer Regulation, ARIZ. ATT'Y, Feb. 2003, at 37, 39.
  \item \textsuperscript{38} See, e.g., Disciplinary Report, ALA. LAW., May 1996, at 180, 182–83.
  \item \textsuperscript{39} See, e.g., Discipline Update: Sanctioned Attorneys, ARIZ. ATT'Y, Apr. 2001, at 53, 54-5.
  \item \textsuperscript{40} See, e.g., Lawyer Regulation, ARIZ. ATT'Y, Feb. 2003, at 37, 39.
  \item \textsuperscript{41} See, e.g., Lawyer Regulation, ARIZ. ATT'Y, Apr. 2003, at 40, 46.
  \item \textsuperscript{42} See, e.g., Bar Briefs: Attorneys Disciplined, ARIZ. ATT'Y, Aug.-Sept. 1998, at 42, 43.
  \item \textsuperscript{43} See, e.g., Disciplinary Notices, ALA. LAW., Nov. 1999, at 422, 423.
  \item \textsuperscript{44} See, e.g., Disciplinary Notices, ALA. LAW., Sept. 1999, at 343, 346.
  \item \textsuperscript{45} See, e.g., Orders of Discipline and Disability: Reprimand, MICH. B.J., Sept. 2003, at 50, 50.
  \item \textsuperscript{46} See, e.g., Lawyer Regulation, ARIZ. ATT'Y, July-Aug. 2006, at 42, 44.
  \item \textsuperscript{47} See, e.g., Lawyer Regulation, ARIZ. ATT'Y, Feb. 2003, at 37, 39.
  \item \textsuperscript{48} See, e.g., Discipline Corner, UTAH B.J. 25, Sept. 1998, at 25, 26.
  \item \textsuperscript{49} See, e.g., Unparalleled, supra note 31, at 16.
\end{itemize}
Table 1 shows the raw results of the surveyed cases, broken down into categories by *to whom* lies were told.

<table>
<thead>
<tr>
<th>Punishment</th>
<th>Non-Specific</th>
<th>Client</th>
<th>Opposing Party</th>
<th>Third Party</th>
<th>Court</th>
<th>Other Official</th>
<th>Aggravating Factors</th>
</tr>
</thead>
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<td>Informal Discipline (n=17)</td>
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<td>1</td>
<td>1</td>
<td>5</td>
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<td>2</td>
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<td>4</td>
<td>15</td>
<td>30</td>
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<td>38</td>
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<td>1</td>
<td>14</td>
<td>10</td>
<td>17</td>
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<td>2</td>
<td>4</td>
<td>12</td>
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<td>7</td>
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<td>1</td>
<td>14</td>
<td>11</td>
<td>21</td>
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<td>0</td>
<td>3</td>
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<td>n=258</td>
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<td>42</td>
<td>9</td>
<td>35</td>
<td>116</td>
<td>101</td>
<td>187</td>
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</table>

Table 1: Number of cases of bar discipline under the Model Rules against dishonesty (Rules 4.1(a) and 8.4(c)) between 1994 and 2007 as reported on the LEXIS-NEXIS database, divided into categories by the party to whom the lie was told.
Figure 1 shows the total frequency of cases involving lies, broken down by *to whom* the lies were told.

**Figure 1**: The total frequency of cases involving lies to each party derived from the raw data in Table 1.

Approximately forty-five percent of cases involved lying to the court, and slightly less than forty percent involved lying to some other official body. Note that discipline for lying to a private party occurred with much less frequency than discipline for lying to a court or other official body. The data also show that, of all surveyed cases imposing discipline on the basis of Rule 8.4(c) or 4.1(a), the substantial majority involved some aggravating factor.

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50. Note that these categories are not exclusive and that many cases involved lying to more than one sub-category; accordingly, the percentages will total greater than 100.
Figures 2 through 4 separate the frequency of lying cases by the type of punishment received.

**Figure 2:** The frequency of cases involving lies, separated by *to whom* the lie was told and by punishment: informal discipline (●), formal censure (■), and probation (▲).

**Figure 3:** The frequency of cases involving lies, separated by *to whom* the lie was told and by punishment: suspension for 30–179 days (●), suspension for 180–364 days (■), and suspension for 365–730 days (▲).
The frequency of cases involving lies, separated by to whom the lie was told and by punishment: suspension for 731–1095 days (♦), suspension for 1096–1825 days (■), and disbarment (▲).

Figures 2 through 4 demonstrate that aggravating factors were a substantial element to each type of punishment. Even when the court merely issued an anonymous reprimand, aggravating factors were present in half of the cases; on the other hand, eight of every ten cases of disbarment involve aggravating factors. Figures 2 through 4 also demonstrate that, as punishment became more severe, cases were more likely to involved lying to some official body—usually the bar disciplinary committee. The frequency of cases involving lying to the court, however, remained steady (near forty percent) in cases bringing suspension or disbarment. Finally, Figures 2 through 4 show that, except for cases resulting in probation, there is a thirty percent chance that the case involved lying to a client; punishment for lying to a third party occurred in no more than twenty percent of cases resulting in suspension or disbarment; and the frequency of punishment for lying to opposing counsel were negligible when punishment was more severe than censure.

Figures 2 through 4 also demonstrate that the frequency of cases involving aggravating factors followed the logical trend noted above: the longer the suspension, the more likely it is that such factors were present. The frequency of cases involving other offense categories varies, which is predictable based on the small sample sizes involved. As above, however, the most frequent lies that were punished by the bar were lies directed to the court or to the disciplinary committee, followed...
by lies directed to clients. Likewise, the frequency of suspensions for lying to clients was more substantial than seen in cases involving censure, but never greater than thirty percent. Notably, approximately seventeen percent of cases punished by suspension for three to five years involved lying to opposing counsel—the most frequent of any offense category.

Table 2 (following page) shows that the aggravating factors present most often in Rule 8.4(c) or 4.1(a) cases are distributed relatively evenly between the offense categories. Neglecting a client’s case or abandoning the client altogether occurred most frequently, followed closely by insufficient communication with client and abuse of client relations. Misappropriation was also present in more than one in four cases.
<table>
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<th>Punishment</th>
<th>Misappropriation From Client Account</th>
<th>Neglected or Abandoned Client</th>
<th>Insufficient Communication With Client</th>
<th>Abused Client Relations</th>
<th>Abused Court Or Counsel</th>
<th>Illegal Conduct or Acts</th>
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**Table 2:** Number of cases of bar discipline under the Model Rules against dishonesty (Rules 4.1(a) and 8.4(c)) between 1994 and 2007 as reported on the LEXIS-NEXIS database, divided into categories by the kind of aggravating factors present.
Figure 5 shows the percentage of cases in which lying (e.g., to clients, the court) and aggravating factors (such as misappropriation or neglecting clients) were simultaneously present and the percentage of cases in which lying and aggravating factors were independent—i.e., cases in which lies were not accompanied by any aggravating factors, and cases in which aggravating factors were not accompanied by any lies.

**Figure 5:** The frequency of Rule 4.1(a) and 8.4(c) cases involving lying accompanied by aggravating factors, lying unaccompanied by aggravating factors, and aggravating factors unaccompanied by lying.

As indicated in Figure 5, most cases involve a mix of lying and aggravating factors, but a small—and surprisingly similar—percentage involved lying but not aggravating factors or vice versa. Since these cases could help show what meaning the bars give to the Model Rules against lying, we returned to the data and looked more carefully at these independent cases.
Figures 6 and 7 separate the frequency of independent lying and independent aggravating factors cases by category of offense.

**Figure 6:** The frequency of Rule 4.1(a) and 8.4(c) cases involving only lies and no aggravating factors, separated by *to whom* the lies were told.

**Figure 7:** The frequency of Rule 4.1(a) and 8.4(c) cases involving only aggravating factors and no lies, separated by the type of misconduct.
Notably, Figure 6 shows over seventy percent of independent lying cases involved lies to the court, and over thirty percent involved lies to another official such as the bar disciplinary committee.\textsuperscript{51} Lies to private parties occurred in five to twenty percent of cases. The six cases that involved independent lies that were directed only to private parties and involved no lies to the court or the bar are discussed in detail below.

Figure 7 separates the frequency of independent aggravating factor cases by offense sub-category. The frequency of cases is relatively evenly spread out. The cases most often involved neglecting clients, insufficient communication with clients, and misappropriation. Illegal conduct also played a substantial role in these cases.

II. DISCUSSION

Our hypothesis proposed that state bar discipline committees, and hence, by implication, the institutional legal community, do not recognize a clear norm against dishonesty; therefore, the hypothesis predicted that the bar would not punish lying qua lying unless some significant, independent offense was present. The general trend of the data presented above supports that hypothesis. The results answer two questions: (1) Does the bar punish lying in itself? and (2) What meaning does the bar give to the Model Rules that prohibit lying? The major trends in the mixed and independent cases show that the bar will at most administer a slap on the wrist for lying unless the lies are being used to further a course of more substantial misconduct, such as theft. At the same time, the bar uses Rule 8.4(c) to punish wrongdoing that is addressed by other Model Rules, such as the duty of candor to a tribunal,\textsuperscript{52} or that deserves punishment but cannot be reached by the Rules, or occasionally as a means to throw the book at a particularly egregious offender. This hesitance and confusion suggest that Rules 8.4(c) and 4.1(a) do not represent a significant norm against lying qua lying held clearly or consistently by the institutional legal community.

A. Major Trends

The major trends suggest that lying is viewed as a minor infraction and will only be substantially punished when it accompanies some other

\textsuperscript{51} As above, the tables are not cumulative.

\textsuperscript{52} \textit{MODEL RULES OF PROF'L CONDUCT} R. 3.3(a)(1) (2007) states that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."
offense, such as when an attorney lies to the court, or when an attorney lies during an investigation by the bar for some other misconduct. Over sixty percent of the sampled cases citing Rule 8.4(c) or 4.1(a) involved some violation for misconduct other than lying. Often, money seems to be the crucial factor. When "misrepresentation" means that a lawyer simply refuses to perform his part of the contract, but tells the client that performance is underway, then substantial punishments followed.53

Likewise, when "dishonesty" means theft from a trust account, or when it means avoiding a client altogether to hide some other theft or neglect, substantial punishments followed.54 But when lying simply means stating something untrue or omitting the truth, the bar did not appear to consider it worth punishing. For instance, an attorney was suspended by the Alabama bar for five years for, among other things, negotiating three worthless checks and neglecting several cases.55 The disciplinary committee specified which Rules were violated in each count. Notably, it cited Rule 8.4(c) as the Rule the attorney violated when he wrote bad checks and lied to a client about the status of a neglected case, and then attempted to file the case only after the client terminated him; however, it did not cite Rule 8.4(c) in four other counts of neglect or one other count of lying to a client.56 This bar gave Rule 8.4(c) a particular meaning that we suggest reflects the one the rest of the institutional legal community holds—i.e., that lying is not an offense serious enough to warrant sanction unless it involves stealing money or lying to the court.

In addition, some cases citing Rule 8.4(c) or 4.1(a) involve conduct that runs afoul of notions of professionalism but that the bar cannot reach under other statutory versions of the Model Rules. For instance, an attorney was censured for forcefully grabbing his opponent's tie during deposition,57 and several were punished for leaving threatening voicemails for their opponents.58 One attorney was reprimanded for

53. See, e.g., Disciplinary Notices, ALA. LAW., May 2006, at 170, 170 (attorney disbarred for, among other things, abandoning several clients after accepting retainers and assuring them that their cases would proceed under another attorney's supervision during his vacation, while in fact he was being suspended and had made no arrangements for his clients).
54. See, e.g., Disciplinary Notices, ALA. LAW. Jan. 2001, at 77 (attorney suspended for 91 days after he admitted to commingling client and personal funds, taking unauthorized withdrawals from trust accounts, and failing to render an accounting of the trusts in a timely fashion).
56. Id.
58. See, e.g., Lawyer Regulation, ARIZ. ATT’Y, Mar. 2007, at 77, 77. The attorney in question also lied to a police officer during an investigation of the incident.
secretly recording his opposing counsel and another was anonymously reprimanded for secretly taping his wife’s phone calls during an acrimonious divorce.\textsuperscript{59} Another was reprimanded for billing a client for a “free” consultation, and then sending the client another bill for preparing an answer to his subsequent complaint to the bar disciplinary committee.\textsuperscript{60} Still another was reprimanded for inducing a credulous party to contribute one hundred thousand dollars to his client, a victim (or accomplice) of a so-called “419 scam,” by “backing” the transaction.\textsuperscript{61} No rule specifically addresses these kinds of misconduct, but several bars seem to believe that a Rule with a suitably ambiguous meaning lends itself to being stretched to cover such cases.

Also, the circumstances of some cases suggest that the disciplinary committee invoked the Rules against lying to “throw the book” at an attorney for outrageous conduct. For instance, an attorney was suspended for six months for violating Rule 8.4(c) by conducting an affair with a judge before whom she represented dozens of clients.\textsuperscript{62} Another attorney was suspended for three years for conspiring to launder thousands of dollars in another state.\textsuperscript{63} One case involved an attorney who neglected clients, misappropriated funds, and even tried to trick the other party into proceeding into the wrong courtroom at a hearing.\textsuperscript{64} Another memorable case involved “a pattern of unethical conduct unparalleled in the history of [the bar] Commission.”\textsuperscript{65} The

\textsuperscript{61} Disciplinary Notices, ALA. LAW., May 2003, at 196, 199. Such confidence games sometimes are called “Nigerian bank scams” and are described in detail at Penn Information Security: The “419/Nigerian” Scam, http://www.upenn.edu/computing/security/advisories/419scam.html (last visited Apr. 10, 2009). In this case, the attorney in question took on a client who claimed that a Nigerian official had notified him that $31 million was in a London bank account that the client could empty once he provided $200,000 for taxes and fees. The attorney arranged a contingent fee of $1,000,000 to assist by locating “investors.” The attorney located an investor who agreed to a three day promissory note with a three-to-one return on condition that the attorney would “stand behind” the deal. The attorney told the investor that he would do so and had put his own money behind the deal, when in fact he had merely persuaded his cousin to invest as well. Apparently the attorney did not realize that the entire affair was a confidence game until after the client disappeared and several calls to London indicated that the bank in question did not exist. From then on the attorney avoided the investor’s attempts to collect on the promissory note until the investor filed a bar complaint.
\textsuperscript{62} Lawyer Regulation, ARIZ. ATT’Y, July/Aug. 2006, at 42, 44.
\textsuperscript{63} Orders of Discipline and Disability, MICH. B.J., Aug. 1998, at 856, 860.
\textsuperscript{64} Discipline Corner, UTAH B.J., Jan.-Feb. 2003, at 43, 44.
\textsuperscript{65} Unparalleled, supra note 29, at 16.
Commission’s final, unanimous decision to disbar the attorney in question stated that the attorney’s “disregard for the interests of her clients and others [was] matched only by her disdain for fundamental precepts of honesty and trust which are the bedrock of our profession . . .”66 The complaint spelled out eleven counts of misconduct in which the attorney neglected clients, counseled them to ignore court orders, blackmailed other attorneys or clients, wrote bad checks, and stole from awards.67 The only violations of Rule 8.4(c) in this case were writing bad checks (fraud) and neglecting clients (misrepresentation of intent to fulfill a contract)—that is, either the bar committee held that Rule 8.4(c) is about money or that it is just another charge to throw at an egregious offender. In neither case does a norm against lying qua lying appear as a significant, independent factor.

B. Independent Variable—Lying

Isolating lying from other misconduct helps show that our hypothesis is correct because the independent cases of lying are punished lightly, suggesting that some special misconduct, rather than lying itself, brings punishment. Seventy percent of the cases in which no aggravating factor was present still involved an attorney violating his duty of candor to a tribunal, either by lying to a bar discipline committee or by lying to a judge while representing a client. For instance, an attorney was disbarred after she fabricated an entire theory of medical damages during trial, and then invented physicians to substantiate it.68 Another was suspended for forty-five days for submitting her own urine in place of a client’s.69 Most cases of lying to a tribunal, however, were not as outrageous; many simply involved practice while suspended or while not admitted pro hac vice.70

Even the cases punishing lies between private parties support our hypothesis. Only six cases (two percent) involved lying accompanied by no aggravating factors and no lies to a tribunal. Two of those cases resulted in anonymous reprimand, while the other four were punished by formal censure. The two anonymous reprimands came from lying to a client (a rape victim) about filing a case against the county71 and from

66. Id. (emphasis added).
67. Id. at 16-20.
69. Disciplinary Notices, ALA. LAW., May 1999, at 204, 204.
ordering a number of false magazine subscriptions to harass an ex-wife’s new boyfriend during an acrimonious divorce.\textsuperscript{72} While both cases involved false statements, the sensitive nature of the former and the unusual nature of the latter may have more to do with bar discipline than a scrupulous dedication to a clear principle of professional honesty.

On the other hand, the four cases of private lying that resulted in formal censure involved misconduct that directly violated a principle of professional honesty. In one case an attorney who had been suspended maintained an elaborate website, including forms for download—implying to the public that he was still an active member of the bar.\textsuperscript{73} In another case, an attorney did not accurately answer under oath that he had previously represented a client, although he called the questioning attorney soon thereafter and rectified the mistaken impression.\textsuperscript{74} In the third case, an attorney sent an abusive letter to a school principal in which he threatened litigation and claimed to be the uncle of his young client, which was not the case.\textsuperscript{75} Finally, in a much-publicized case, an attorney pretended to be a chiropractor to gain information about an insurance company that he planned to sue for denying his client benefits.\textsuperscript{76} Each case clearly violated a lawyer’s duty to avoid misrepresentation and dishonesty. As noted, however, the punishment imposed by the bar in each of these cases was little more than a slap on the wrist.

C. Independent Variable—Aggravating Factors

One can sketch out the independent meaning that the bar gives to Rules 8.4(c) and 4.1(a) by noting the cases where only aggravating factors are present. Several helpful cases specify which Model Rules were violated by each part of an offender’s conduct or cite only Rule 8.4(c) or 4.1(a). Bar committees frequently used these Rules to punish pilfering from a trust account\textsuperscript{77}—including one belonging to the Inns of Court.\textsuperscript{78}

\textsuperscript{72} Discipline Corner, UTAH B. J., Jan./Feb. 2003, at 43, 44.
\textsuperscript{73} Lawyer Regulation, ARIZ. ATT’Y, Mar. 2004, at 65, 71.
\textsuperscript{74} Disciplinary Actions, TEX. B.J., Oct. 1996, at 911, 913.
\textsuperscript{76} In re Gatti, 8 P.3d 966 (Or. 2000); Discipline, OR. ST. B. BULL., Dec. 2000, at 39, 40-41; see also, e.g., Douglas R. Richmond, Deceptive Lawyering, 74 U. CIN. L. REV. 577 (2005).
\textsuperscript{77} See, e.g., Timothy B. Strauch, 2003 Another Busy Year for Office of Disciplinary Counsel, MONT. LAW., Mar. 2004, at 28, 30 (attorney disbarred in default judgment after being accused by complainant of stealing from a trust account).
\textsuperscript{78} Lawyer Regulation: Sanctioned Attorneys, ARIZ. ATT’Y, May 2007, at 55, 57
As noted above, some disciplinary committees seem to have used Rule 8.4(c) as a catch-all for conduct that deserved punishment but did not clearly violate other Model Rules. For instance, one committee used Rule 8.4(c) to punish an attorney who, while riding as a passenger during a traffic stop for intoxication, cursed at and lied to a police officer and then advised the driver to leave the scene.\textsuperscript{79} Likewise, a committee used Rule 8.4(c) to punish an attorney who made disparaging remarks to the gallery about the presiding judge after he had retired to his chambers,\textsuperscript{80} and another used Rule 8.4(c) to punish a violation of campaign contribution laws.\textsuperscript{81}

Just as with outrageous lies, bar committees use Rule 8.4(c) to punish outrageous but substantially independent aggravating conduct. One disciplinary committee disbarred an attorney who was convicted of enticing a minor via the Internet, citing Rule 8.4(c).\textsuperscript{82} Another committee used Rule 8.4(c) to disbar an attorney who had arranged more than 150 fee agreements with contingencies that imposed punitive costs on clients who filed complaints with the bar.\textsuperscript{83} Others used Rule 8.4(c) to suspend an attorney who set up dummy corporations designed to pad client fees,\textsuperscript{84} to indefinitely suspend an attorney who engaged in fraudulent corporate transactions outside his practice,\textsuperscript{85} and to suspend an attorney who filed a number of false documents with the U.S. Customs Service in order to import products containing prohibited chemicals.\textsuperscript{86}

\textsuperscript{79} Orders of Discipline and Disability, MICH. B.J., Aug. 2004, at 56, 56. The same attorney was punished five months earlier under Rule 8.4(c) for appearing in court while intoxicated, see Orders of Discipline and Disability, MICH. B.J., Mar. 2004, at 62, 62, even though Michigan subjects lawyers to punishment for "[c]onduct that exposes the legal profession or the courts to obloquy, contempt, censure or reproach" or "[c]onduct that is contrary to justice, ethics, honesty or good morals." MICH. CT. R. 9.104(A)(1)-(4) (2008).

\textsuperscript{80} Attorneys Disciplined, ARIZ. ATT'Y, Jan. 1999, at 50, 50.
\textsuperscript{81} Carole R. Richelieu & Darryn Manuel, Ethics & Issues, HAW. B.J., July 2006.
\textsuperscript{82} Discipline Corner, 19 UTAH B.J., Mar.-Apr. 2006, at 57, 57. The bar committee invoked Rule 8.4(c) because the attorney had "misrepresent[ed] his age to the agent for the Utah Internet Crimes Against Children Task Force, who posed as a 13-year-old." Id.
\textsuperscript{83} Carole R. Richelien, Ethics & Issues, 9 HAW. B.J. 26, 26 (December 2005).
\textsuperscript{84} Discipline, 65 OR. ST. B. BULL., Nov. 2004, at 43, 46-47 (attorney suspended for one year for creating a false corporation to generate invoices that reflected no additional value to clients or borrowers but doubled the fees charged).
\textsuperscript{85} Orders of Discipline and Disability, MICH. B.J., June 1997, at 586, 596 (reciprocal discipline imposed with Minnesota for fraudulent acts attorney committed while a board member of a private corporation).
\textsuperscript{86} Discipline Corner, UTAH BAR J., Feb. 1998, at 25, 25-26 (attorney suspended for
It is not fair to say that Rules 8.4(c) and 4.1(a) are effectively meaningless or simply superfluous; nevertheless, the independent force that state bar discipline committees give to them often seems to be little more than an idle gesture or an attempt to "throw the book" at an offender. In most surveyed cases, lying was punished because it was part of a broader pattern of misconduct—e.g., because it involved monetary damage to another person. Accordingly, the institutional legal community may be fairly charged with treating *lying in itself* as relatively inconsequential.

III. Why Doesn't Lying Matter?

A. The Utilitarian View

In analyzing the reasons why state bar discipline committees do not recognize a norm against lying *qua* lying, it is perhaps best to begin with an obvious answer: because lying in and of itself simply is not important. After all, it can be argued, every lie is by definition *about* something. And one would think it appropriate for the bar to sanction most heavily those lies that are about important things—that is, those involving theft, fraud on the court, and other actions that cause significant harm to individuals or to the legal system. This view was stated clearly more than two hundred years ago by Jeremy Bentham:

> Falsehood, take it by itself, consider it as not being accompanied by any other material circumstances, nor therefore productive of any material effects, can never, upon the principle of utility, constitute any offense at all. Combined with other circumstances, there is scarce any sort of pernicious effect which it may not be instrumental in producing. 87

Bentham maintained that the principle of utility requires that we judge lies good or bad according to their consequences. 88 Bentham's reasoning certainly would allow us to find a particular lie pernicious on account of its bad consequences (the lie may be instrumental in producing most any "pernicious effect"). But the lie, on this view, is not in and of itself bad because it, like everything else within utilitarianism,

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87. Bok, *supra* note 1, at 47 (quoting JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 223 (1789)).

88. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-7 (1789) (outlining the justification and consequences for public and private conduct of the principles of utility).
can be measured as good or bad only according to the good or bad effects it produces. 89

A central problem with utilitarianism in regard to lying is that those debating whether to lie, like those debating whether to approve a particular lie, will tend to be narrow and limited in choosing what possible costs to weigh in the balance with the benefits of the lie under consideration. 90 The result will be a partial and inaccurate weighing of consequences. 91 Initially, it is extremely difficult to measure the potential costs and benefits of acts in any but the starkest cases where groups of people and multiple goals are involved. 92 Moreover, lies have many, generally ignored, costs for “liars, dupes, all those affected, and for social trust.” 93 And repeated lies have a cumulative effect, far outstripping the impact of one isolated lie, on all those affected and on social trust. 94

We return to this discussion of unintended consequences in our critique of the second justification for failing to enforce a norm against lying qua lying: the belief that some lies are not really lies because those on the receiving end of the deception have no rational expectation of veracity.

B. Games and Bad Actors

Some commentators have argued that lying in negotiation in particular is not really lying at all, given that general conventions of bargaining create the rational expectation that both parties will lie. 95 This notion is manifested in the Model Rules themselves, which state in their comments that “under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact,” such as “[e]stimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement.” 96 This view, if not the dominant one in the legal profession, appears at least to be that of many lawyers in regard to the

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89. Id.
90. BOK, supra note 1, at xix.
91. Id.
92. Id. at 49.
93. Id. at 50.
94. This is a point recognized by more sophisticated utilitarians. See BOK, supra note 1, at 276.
95. See, e.g., White, supra note 7.
issue of attorney dishonesty.\textsuperscript{97} Of particular note is a 1997 ABA survey in which 100 lawyers were asked whether “puffery” during settlement negotiations was ethically permissible.\textsuperscript{98} The survey showed that sixty-one percent of respondents responded affirmatively, while seventy-three percent of the respondents confirmed that they personally engaged in negotiation puffery (though it was not clear whether such puffery involved outright misrepresentation).\textsuperscript{99}

At least one academic goes further than such surveys would seem to indicate.\textsuperscript{100} Monroe Freedman argues that a plaintiff’s attorney has a duty to his or her client to ask for more money from the defendant’s attorney when that attorney offers a larger settlement than the plaintiff in confidentiality has indicated he or she would accept.\textsuperscript{101} He further argues that this duty extends to making intentional misrepresentations of facts to opposing counsel and even to a judge involved in negotiations regarding a client’s minimum or maximum settlement figure.

Freedman justifies the lawyer’s lies by asserting that, under the circumstances he outlines, opposing counsel (and the judge) has no right to know the relevant settlement figure because it is confidential information, which the lawyer has a duty to keep secret.\textsuperscript{103} But surely this response cannot be intended to stand on its own. The lawyer can, after all, simply refuse to answer inappropriate questions, thereby protecting the confidential information and avoiding the need to lie. Freedman’s further justification has two elements: first, there are times when silence is insufficient to protect the confidential information—sometimes silence will “tip off” opposing counsel or the judge to the content of the confidence;\textsuperscript{104} second, given the conventions of negotiation and the adversarial system, other parties have no reasonable expectation of veracity, and so it is permissible to deceive them.\textsuperscript{105}

\textsuperscript{98} Id. at 186.
\textsuperscript{99} Id.
\textsuperscript{100} Freedman, supra note 7.
\textsuperscript{101} Id. at 778-79.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 773, 778-79.
\textsuperscript{104} Freedman, supra note 7, at 773-74 (e.g. a judge who asks “did he do it?” in regard to a defense attorney’s client).
\textsuperscript{105} We leave to one side, for current purposes, Freedman’s claim that “mental reservation” (liars’ own unexpressed thoughts providing qualifiers or additional facts that would make the statement true) make intentionally deceptive statements something other than lies. The point, certainly from a professional and social point of view, is that the other party is intentionally deceived and such intentionally misleading statements are, or should be, treated as such. See, Bok, supra note 1, at 14-15.
To take Freedman's stronger claim first, there may be times when the lawyer is caught up in what Bok calls an "acute crisis," when there is not enough time for the lawyer to seek assistance from outside and must either lie or allow a misdeed to cause significant, perhaps irreparable harm.\(^\text{106}\) Freedman's example seems powerful. Suppose a Legal Aid attorney is confronted by a judge who asks whether his or her client "did it."\(^\text{107}\) The question is clearly improper in that it asks the lawyer to volunteer confidential information.\(^\text{108}\) Silence or a refusal to answer may well "tip off" the judge to the client's guilt (or lead the judge to merely assume it).\(^\text{109}\) And the consequences may be dire—the lawyer may incriminate the client,\(^\text{110}\) perhaps bringing conviction where acquittal or a lesser charge might reasonably be expected.

In noting the power of Freedman's argument, however, we would not want to be taken as endorsing his conclusion—that the lawyer is duty-bound to lie under these circumstances. Most important, in our view, is the misleading manner in which Freedman presents his own hypothetical. For, while his hypothetical may meet the definition of an acute crisis, the actual events on which he bases the hypothetical do not. Freedman draws his hypothetical from reports taken from Legal Aid lawyers in Brooklyn that "[s]ome judges . . . would routinely call defense counsel to the bench prior to trial in criminal cases and say, 'Come on, let's move this along. Did he do it or didn't he?'\(^\text{111}\) Unless the Legal Aid lawyer is inexperienced and has failed to do due diligence by inquiring about the judge, there is no surprise here. What we have, instead, is a circumstance in which large numbers of attorneys are allowing judges to habitually behave in an inappropriate manner, seeking to reduce their own workload at the expense of procedural fairness.\(^\text{112}\) The proper response, then, would not be to lie to such a judge, but rather to report his or her misconduct to the appropriate authorities. As to bad consequences for clients and for the attorneys themselves, solidarity rather than lying would appear the appropriate response—joint complaints and joint refusal to answer inappropriate

\(^{106}\) Id. at 108-10.

\(^{107}\) Freedman, supra note 7, at 773-74.

\(^{108}\) Id. at 774.

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) Freedman, supra note 7, at 773.

\(^{112}\) See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007), which states that a judge "shall uphold and promote the independence, integrity, and impartiality of the judiciary". Impartiality is defined in the Terminology section to mean "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Id.
questions, along with coordinated appeals in the cases of any clients whose rights have been negatively affected. The point, to which we will return, is that lying, here, is the easy, lazy way out, justified by the lawyer's failure to consider all available options, as well as all of the deleterious consequences of the lie. A true crisis may justify (or more appropriately give us grounds to excuse) a lie; but Freedman's need to mischaracterize his own hypothetical points to how truly unusual such cases are.

Next we turn to Freedman's reprise of the argument that participants in negotiations have no rational expectation of veracity from opposing counsel. Freedman asserts that the "flat-out misrepresentation" of the lawyer in stating that his or her client demands more than is the case is not, in fact, a lie because generally accepted conventions of bargaining and the adversary system should make clear to opposing counsel that nothing said in those negotiations can be taken as true. This is the by now familiar argument that negotiations are a kind of game in which the players have agreed, prior to playing, to abide by rules allowing lying. To justify such a view, however, we must assume that the game has been entered into voluntarily and with foreknowledge by all parties. And, even if opposing counsel has knowingly consented to bargaining with an expectation of lying, has the client? Clients, if they are to assert their rights, must either engage in negotiation or take on the often immense burden of litigation, with its inevitable delays and with costs that may force them to abandon their claims entirely. Thus their lawyers, if they are to serve the clients' interests, often must pursue negotiation. One who expects bad practices has not thereby voluntarily accepted them. Could we say, for example, that a defendant who agrees to pay a bribe to a corrupt judge, knowing that failure to do so would result in years of imprisonment, has "volunteered" to pay for freedom?

It also may be the case, particularly for unsophisticated or unknowing third parties, that the line between the realm of negotiation (in which veracity cannot be assumed) and other areas of communication may be blurry. Discovery is one realm of legal practice in which

113. Freedman, supra note 7, at 778.
114. BOK, supra note 1, at 83.
115. Id.
116. We note here a more general justification by Freedman of his assertion of the duty to lie: the lawyer's duty of "entire devotion to the interests of the client." Freedman, supra note 7, at 771.
117. BOK, supra note 1, at 83.
118. Id. at 131-32. Bok uses the example of workers told by their employer that the plant
lawyers may engage in a kind of deceptive bargaining—responding to overbroad requests with overly narrow interpretations of what must be produced. More generally, one cannot simply "cordon off" a realm of deceitful negotiation from the rest of one's practice and communications; while expectations may differ in negotiations from other areas of practice, the very act of participating in deceptive bargaining may affect the lawyer's ability to discriminate among kinds and levels of falsehood, allowing lies to multiply and spill over into different relationships.

IV. LYING AS A BAD HABIT

According to Immanuel Kant, the deceiver is among the chief victims of his or her deceit because the one who lies "throws away and, as it were, annihilates his [or her] dignity as a [person]." On a more concrete level, by lying the lawyer turns himself or herself into a liar. And a liar will not become an honest person simply on account of leaving the realm of negotiation and entering that of, say, client billing. The results are bad for the lawyer, the clients, and the legal system.

In the *Nicomachean Ethics*, Aristotle describes what he calls the moral virtues (such as courage, magnanimity, and honesty) as the result of habituation—of repetition in the doing. We acquire virtues by doing their corresponding acts; as a builder becomes a builder by

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119. See David Luban, Lawyers and Justice: An Ethical Study 51 (1988) (noting that ruthless behavior such as discovery abuse is seen as necessary by some because the only effective method of ensuring adequate representation is for each side to use every tactic available; otherwise, one side will use all available weapons while the other will fail to zealously represent his or her client's interests); see also Fred Zacharias, Lawyers as Gatekeepers, 41 San Diego L. Rev. 1387, 1389-90 (2004) (quoting 1 Phillip C. Jessup, Elihu Root 133 (1938)) (noting that lawyers have always been responsible for preventing client misconduct and that "half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop").

120. See, e.g., White, supra note 7, at 928-29 ("To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation . . . . The definition of truth is in part a function of the substance of negotiation.").

121. Bok, supra note 1, at 132.

122. Id. at 32 (quoting Immanuel Kant, The Metaphysics of Morals 225 (Mary Gregor, trans., Harper & Row 1964) (1797)).

123. See Lerman, supra note 5, at 705-06.

building, a just person becomes just by doing just things.  
Likewise, by acting in an unjust manner in our transactions with others we can become unjust. Our nature is such that we can develop in ourselves (as rulers can help develop in us through their laws) sets of habits that constitute character states. While no one desires to be vicious (to have the character of a vicious person, such as, say, one who is unjust) our desire to do vicious things can, if we give in to it and do the vicious acts, make us, in fact, vicious.

In describing this constancy of character—the solidification of acts into habits and into states of character—Aristotle is not claiming that our nature is somehow utterly set in early life, but rather that habits, though not innate, become difficult to change once established because they become natural to us over time. One benefit of this constancy is that a person can become less liable to give in to vicious desires once he or she has learned to despise such desires through habit. But the person also must continue to do good acts and despise bad ones, lest bad acts and bad character ensue.

Modern studies of human behavior bear out the general outlines of Aristotle's argument as applied to lying: lying is a developmental process by which one learns to lie—that is, learns the means to make people believe something that is not true. The trait of lying develops in children through patterns of upbringing that encourage lying—e.g., through excessive punishment for other transgressions (effectively encouraging lying as a self-defense mechanism) or from parental patterns of reward and punishment that blur the lines between reality and useful fantasy. Despite attempts in recent decades to dismiss traits by underlining the importance of particular circumstances on human behavior, including lying, the psychological literature is quite clear that dispositions, that is, the stability of certain personality features, are

125.  *Id.* at 21.
126.  *Id.*
127.  *Id.*
128.  ARISTOTLE, *supra* note 124, at 121.
129.  *Id.* at 52.
130.  *Id.* at 121.
131.  *Id.* at 23.
134.  *Id.* at 81.
135.  See Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1240 (2001) and citations therein, emphasizing the role of "situationism" in correcting what had been an overemphasis on "cross-situational" dispositions.
played out in consistent courses of conduct that give significant indications that are useful in predicting future behavior.\textsuperscript{136} And the personality features are neither purely inborn nor somehow imprinted on a person from outside; habits are learned through repetition in the doing—one gains a facility and a tendency to act in a given way through simple practice and repetition.\textsuperscript{137} Thus, the choice to pursue a given course of action under given circumstances constitutes a choice to form a habit of conduct which thereby becomes, over time, habitual or unconscious and automatic.\textsuperscript{138}

Moreover, the logic of lying tends toward habit formation: few lies can stand on their own—most require follow up lies to keep the original deceit from coming to light.\textsuperscript{139} The liar’s view of moral distinctions coarsens, psychological barriers to lying break down, and the behavior of the liar—even if he or she is not caught in the lie—changes in subtle ways such that others treat him or her with less trust.\textsuperscript{140} And this self-reinforcing aspect of lying is a particular problem for lawyers, in whose profession “opportunities to deceive flourish,”\textsuperscript{141} where deceptive countermeasures are a likely response from other lawyers,\textsuperscript{142} where others already are defined as adversaries and so may easily be defined as enemies not deserving of the truth,\textsuperscript{143} and where deceptive habits can be the result.\textsuperscript{144}

This basic understanding of habit and character formation is instantiated in the rules of evidence, in which both character—“a generalized description of a person’s disposition, or of the disposition in respect to a general trait, such as honesty”\textsuperscript{145}—and habit—“one’s regular response to a repeated situation”\textsuperscript{146}—are important categories.\textsuperscript{147} And, despite the real limits on admissibility of character evidence,\textsuperscript{148} courts clearly allow counsel to use prior conduct in order to impeach a

136. Id. at 1240-41.
137. Id. at 1296-97.
138. Id. at 1297.
139. BOK, supra note 1, at 25.
140. Id.
141. Id. at 119.
142. Id. at 120.
143. BOK, supra note 1, at 139.
144. Id. at 121.
145. See Sanchirico, supra note 135, at 1297.
146. See Sanchirico, supra note 135, at 1297.
147. See, e.g., FED. R. EVID. 406.
148. See generally Sanchirico, supra note 135, (arguing that the character evidence rule and its exceptions are best explained not by concerns over the predictive value of character evidence, but rather by the desire to give proper incentives to people for avoiding commission of crimes).
witness's in-court testimony as lacking veracity. Evidence of a witness's prior convictions for felonies, other crimes involving false statement or dishonesty, and even misbehavior not involving conviction but nonetheless going to the witness's character for untruthfulness, may be admissible.

V. THE FRAGILITY OF TRUST

Once words are no longer aimed at communicating facts and states that reflect reality, they cease to be a tool for sharing one's apprehension of reality or forging meaningful shared understanding and trust as the basis of common action. When words mean whatever we want them to mean, they become nothing more than a tool for subjugating others to our will:

"I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant there's a nice knock-down argument for you!"
"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected. "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
"The question is," said Alice, "whether you can make words mean so many different things."
"The question is," said Humpty Dumpty, "which is to be master—that's all."

What happens when each person becomes master of his or her own words? We suggest that, before the bar grants that punishing lies is simply too burdensome or that lying should not be punished once everyone lies and expects lies, it should explore fully the probable

149. See id. at 1282 and citations therein.
150. Fed. R. Evid. 609(a)(1). Admissibility of this type of evidence is at the court's discretion. Id.
152. Fed. R. Evid. 608(b)(1). Admissibility of this type of evidence is at the court's discretion. Id.
153. See, e.g., Box, supra note 1, at 18 ("There must be a minimal degree of trust in communication for language and action to be more than stabs in the dark.").
155. Compare what we suggest is a prevalent attitude toward lying with Machiavelli's classic defense of it:
costs to clients, third parties, and society as a whole as well as the legal profession itself. A society in which words and gestures cannot be counted upon to mean what they have meant in the past, what we take on trust in any conversation they shall mean (rather than what their current master wills them to mean), will cease to exist as communication and common actions become haphazard, unreliable, and in the end impossible.\textsuperscript{156}

On an immediately practical level, decreasing trust increases transaction costs:

As trust declines, the costs of doing business increase because people must engage in self-protective actions and continually make provisions for the possibility of opportunisti\(c\) behavior on the part of others. In the absence of trust, "people are increasingly unwilling to take risks, demand greater protections against the possibility of betrayal, and increasingly insist on costly sanctioning mechanisms to defend their interests."\textsuperscript{157}

When attorneys must expend time and energy to formalize agreements and fight out disputes, the parties are the ones who pay.\textsuperscript{158} In the short term, obviously, distrust increases billable hours for lawyers. But the costs are very real. Certainly the prosperity of society as a whole (a whole of which lawyers are a part) depends in large measure on

\[S\]ince it is my intention to write a useful thing for him who understands, it seemed to me more profitable to go behind to the effectual truth of the thing . . . . \[T\]here is such a distance between how one lives and how one should live that he who lets go that which is done for that which ought to be done learns his ruin rather than his preservation—for a man who wishes to profess the good in everything needs must fall among so many who are not good. Hence it is necessary . . . to learn to be able to be not good, and to use it and not use it according to the necessity.

\ldots

How praiseworthy it is . . . to maintain faith and to live by integrity and not by cunning, everyone understands; nevertheless one sees by experience, in our times, that those . . . who have done great things have taken little account of faith, and have also known with cunning how to go round the brains of men; and in the end they have surpassed those who have founded themselves on loyalty.


\textsc{BOK, supra} note 1, at 18-19.


the amount of trust inhering in the culture.159 It is trust in colleagues and trading partners that cements relationships and allows for extensions of credit and other actions necessary for continued economic growth and prosperity in the face of crises and more typical market (and other) uncertainty.160 Without trust, even the most basic economic relations break down.161

If the profession’s mores against lying were relaxed and attorneys thought lying was ethically insignificant because law is a game—or worse yet, a war—162—it would be natural and inevitable that lawyers would become pirates or facilitators of piracy rather than advocates for justice. For example, we might consider what the loss of honesty would mean in light of a lawyer’s gate-keeping responsibility—the duty to tell “would-be clients that they are damn fools and should stop.”163 If we believe lawyers should be willing to deceive investors on behalf of their clients, we should not be surprised to read that “without lawyers, few corporate scandals would exist and fewer still would succeed long enough to cause any significant damage.”164 We note here the staggering human price that accompanied the scandal perpetrated by

160. See id. at 7-8 (reviewing several instances in which social trust allowed for the formation of communities within economic structures such that companies could be saved in times of crisis and workers and management could cooperate for the common good).
161. See id. at 9-10 (detailing examples of low-trust situations which produced significant economic inefficiencies and barriers to development).
162. See Luban, supra note 119, at 51.
163. Zacharias, supra note 119, at 1390 (quoting Phillip C. Jessup, Elihu Root 133 (1938)).
164. Susan P. Koniak, The Lawyer's Responsibility to the Truth, 26 Harv. J.L. & Pub. POL'Y 195, 195 (2003). In fact, as Professor Koniak notes, Enron’s lawyers were more than mere facilitators of Enron’s activity:

[Representatives of Citigroup and J.P. Morgan, banks that also appear to have assisted Enron in its hell-bent quest to cook its books, testified before Congress that the shady and, again in my opinion, illegal transactions between the banks and Enron were approved by Citigroup’s, J.P. Morgan’s, and Enron’s lawyers. Further, the First Interim Report of Neal Batson (the court-appointed examiner for the Enron bankruptcy proceedings) makes clear that the accountants sought out and relied on the guidance of lawyers when trying to determine if certain transactions should be booked as sales or something else. In fact, Enron had to provide Andersen with two legal opinions from its outside counsel in order for Andersen’s accountants to sign off on the accounting treatment of the transactions. This clearly suggests that these were not situations where, as many have claimed, lawyers were merely following the advice of the accountants, but rather it was the lawyers who made the accountants feel comfortable about the way some of the Enron transactions were to be booked.

Id. at 197 (footnotes omitted).
Enron: 4,500 people in Enron’s Houston office lost their jobs, while Enron’s employees lost $1.6 billion in 401(k) savings and Enron’s investors lost $61 billion in capital.\textsuperscript{165} In addition, the public already holds a dim view of honor amongst lawyers.\textsuperscript{166} In the absence of trust rooted in dependable veracity, it will be increasingly difficult over time to square this perception with the position that the lawyer’s role is vital to civilized society.\textsuperscript{167}

Increasing distrust has coincided with an array of mental and emotional problems associated with being a lawyer.\textsuperscript{168} How great a portion of lawyer unhappiness is due to antagonism and distrust between practitioners is not clear, but it would be surprising were a large proportion of attorney dissatisfaction not coming from dealing with untrustworthy “assholes” all day.\textsuperscript{169} Studies suggest that people who lack trust are unhappy and statistically more likely to betray others.\textsuperscript{170} We suggest that it would be reasonable to expect negativity to spill over into lawyer-to-lawyer and even lawyer-client relationships in an environment where lies and mistrust are common. The growth of client auditing of legal fees is one obvious example of the impact of such negativity.\textsuperscript{171}

\textsuperscript{165} John R. Kroger, 
Enron, Fraud, and Securities Reform: An Enron Prosecutors

\textsuperscript{166} See The Gallup Organization, Honesty/Ethics in Professions (2008),

\textsuperscript{167} MODEL RULES OF PROF'L CONDUCT pmbl., cmt. 13 (2007).

\textsuperscript{168} Patrick J. Schlitz, On Being a Happy, Healthy, and Ethical Member of an Unhappy,
Unhealthy, and Unethical Profession, 52 VAND. L. REV. 871 (1999) (noting that lawyers are significantly more likely to be depressed, anxious, hostile, and paranoid than their non-legal counterparts); see also, Richard Delgado & Jean Stefancic, Can Lawyers Find Happiness?, 58 SYRACUSE L. REV. 241 (2008).

\textsuperscript{169} Consider the anecdotes in Robert L. Nelson, The Discovery Process As A Circle Of
Blame: Institutional, Professional, And Socio-Economic Factors That Contribute To
Unreasonable, Inefficient, And Amoral Behavior In Corporate Litigation, 67 FORDHAM L.

\textsuperscript{170} Tschannen-Moran & Hoy, supra note 157, at 559 (noting that “[p]eople with a
trust ing disposition tended to be more trustworthy than others, even when they could increase
their gain by being untrustworthy,” while “suspicious people had a greater tendency to be
untrustworthy in their choices”) (internal citations omitted).

\textsuperscript{171} See Darlene Ricker, Auditing Lawyers for a Living 80 A.B.A. J. 65 (1994)
(reporting on the growth in number and prominence of firms specializing in audits of law firm
billing).

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We are not asserting that lawyers have in general become liars (or worse). Rather, our point is that the norm of truth telling must be defended more vigorously because the legal profession itself is rooted in a rejection of the call to lying, being rooted instead in a commitment to trust embodied in the relationship between lawyer and client. The lawyer may incur even fiduciary duties to the client on account of the trust—the confidence and reliance—of that client. Protection of this trust is so important that the lawyer is expected to subordinate his or her own interests to those of the client. And the duty to the client must include maintenance of social trust in the legal profession and society more generally. It is precisely to preserve social trust that John Stuart Mill, perhaps the most famous proponent of utilitarianism, reasoned any person who could lie to protect his or her own immediate interests nonetheless has a duty to tell the truth.

Liars themselves depend on a background of social trust, attempting to act as free riders; they want to be able to lie themselves, and perhaps include their family, friends, clients, or fellow professionals among those with the right to lie, while continuing to forbid lying in general. Such desire for the position of free rider may be justified to oneself through an overly benevolent interpretation of one’s lies as being for the good of others. But can such claims stand up to systemic scrutiny? We note, for example, that no lawyer—not even one who asserts the right to lie in court—would want the jury to be told that the lawyers in whom they put their trust as they pursue the truth may in fact be lying to them; such information would make juries harder to fool and more likely to see deception throughout the legal process. Thus, in the interest of justice (outcomes rooted in facts rather than lies) and

172. See, e.g., United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993) (stating that infringement on the trust relationship between attorney and client would negate the protections of the Sixth Amendment).
174. JOHN STUART MILL, ON LIBERTY 22-23 (G. Sher, ed. 2001) (1869) (arguing that weakening the “trustworthiness of human assertion” would do more harm than any other single thing to hold back “everything on which human happiness on the largest scale depends”).
175. BOK, supra note 1, at 23.
176. Id. at 24.
177. Id. at 163.
178. See, e.g., Stephen J. Safranek, The Legal Obligation of Clients, Lawyers, and Judges to Tell the Truth, 34 IDAHO L. REV. 345 (1997) (arguing that the central purpose of trial is to do justice and that this requires discernment of the truth, which in turn requires truth-
public trust (the common perception that judicial outcomes generally are just) we have evidentiary rules aimed not merely at having both sides heard, but also at allowing those giving testimony to be shown as untrustworthy.179 “Trust and integrity are precious resources, easily squandered, hard to regain. They can thrive only on a foundation of respect for veracity.”180

VI. THE ISSUE OF ENFORCEABILITY

One strong argument as to why the bar should not seek to enforce a norm against lying qua lying remains: lack of ability. One may, and indeed some have, argued that most attorney dishonesty occurs under circumstances and among individuals such that disciplinary bodies have no direct knowledge of any lying and are in a poor position to determine whether any lie actually took place, let alone how serious such a lie actually was; such circumstances make disciplinary action all but impossible, particularly if it is to be just.181 One clear example in this context is the discovery process, which generally takes place with minimal participation by neutral authorities beyond a judge’s fielding of appeals and motions for sanction.182 Under these circumstances the judge generally exercises little actual oversight and has even less desire to get involved in detailed consideration of disputed terms and items.183 Indeed, the judge often may feel justified in letting the lawyers fend for themselves, defending their own rights and interests and those of their clients on their own.184

There is much to be said for the non-enforceability argument in terms of the workability of institutional responses to deceit. But even the discovery process requires a minimal level of trust lest it become unworkably unjust and inefficient.185 And the limited nature of enforceability under these circumstances should not lead the legal profession to surrender the norm of truth-telling or allow it to be undermined by specious arguments. Rather, the profession would do

telling from all parties involved).
179. See supra, notes 145-52 and accompanying text.
180. BOK, supra note 1, at 249.
181. See ARENDT, supra note 2, at 5.
183. Id.
184. Id.
well to explore all feasible ways to uphold the norm. Key in this respect are reputation effects, a term used by economists to indicate the impact that small amounts of incomplete information about an opponent's "type" can have on bargaining games that otherwise result in sub-optimal outcomes.\(^{186}\) One will deal differently with someone known to be dishonest than with one who has a reputation for veracity and fair dealing.\(^{187}\)

Game theorists have modeled reputation effects and noted that certain conditions are necessary for reputation effects to optimize outcomes by checking opportunistic behavior.\(^{188}\) Reputation effects can encourage cooperation when the parties are highly embedded and, consequently, there is some loss attached to betrayal—i.e., when (1) the parties face the prospect of repeated future interactions, and therefore reducing future transaction costs through trust is economically beneficial, and/or (2) information about the parties' present actions can pass freely to third parties because they share social networks, such that the community effectively monitors and sanctions wrongdoers by circulating stories about the present parties that open or foreclose favorable responses in future transactions.\(^{189}\) Ultimately, for trust to form in a particular profession or community, the actors must be interdependent—and thus vulnerable—but confident enough in the competence and shared norms of the other actors and in the mutual goodwill surrounding their relationships that they remain willing to risk the cost of betrayal.\(^{190}\)

Empirical research suggests that reputation and trust can be very valuable commodities.\(^{191}\) Since trust pays off, it is no surprise that legal


\(^{187}\) Nelson, supra note 169, at 776 (noting that during discovery many attorneys will experiment with trial agreements to determine the trustworthiness of opposing counsel).

\(^{188}\) See generally VINCENT BUSKENS, SOCIAL NETWORKS AND TRUST (2002) (discussing the formation of trust when social networks impose sanctions for misconduct and provide information about potential trustees).


\(^{190}\) See Tschannen-Moran & Hoy, supra note 157, at 556-64.

\(^{191}\) Iris Bohnet & Steffen Huck, Repetition and Reputation: Implications for Trust and Trustworthiness When Institutions Change, 94 AM. ECON. REV. 362, 362 (2004) (noting that a good reputation on eBay translated into an 8.1% price premium on goods sold) (citing Paul
scholars have already considered the possibility of using reputation to foster trust and control attorney misconduct. We note, for example, W. Bradley Wendel's study of the anthropology of honor and the possibility of using it to regulate unethical behavior without a state actor.\textsuperscript{192} Professor Wendel suggests that the key to honor (despite its potentially "fusty, aristocratic, and moralistic connotations" for some\textsuperscript{193}) is having one's "outward presentation as a worthy person... confirmed or challenged by others in the relevant social group, who confer honor on persons exhibiting valued characteristics and shame on those who deviate from prescribed standards."\textsuperscript{194} He notes, however, that the current legal market makes this approach difficult by limiting the possibility for embedding lawyers in functioning, enforceable social networks:

Where firms are smaller, they may carefully cultivate a reputation for honesty and probity, which in turn provides them a useful product to sell to clients—namely, the ability to work informally and therefore inexpensively with opposing counsel. The larger a firm becomes, the more difficult it is for outsiders to generalize about its reputation, because there may be individual lawyers within the firm who vary a great deal in their cooperativeness. Similarly, as more lawyers practice in multijurisdictional contexts—say, frequently appearing as national coordinating counsel in local product liability lawsuits—it becomes exponentially more difficult for lawyers and clients in a given locality to learn about the character of the lawyers against whom they are practicing in a particular case. Finally, the increasing diversity in all respects (socioeconomic, racial, gender, clientele, and so on) of the practicing bar makes it more difficult to rely on considerations of character and reputation, because the interpretation of actions may be different in these varied social subcommunities. The most significant factor in the success of nonlegal regulation is the size, geographic concentration, and homogeneity of the relevant market. To the extent legal and structural changes tend to make the marketplace larger (for instance, by relaxing conflicts rules to permit firms to become larger), they will likely undermine the efficacy of nonlegal sanctions, and vice versa.\textsuperscript{195}

\textsuperscript{192} W. Bradley Wendel, \textit{Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice?}, 71 \textit{Fordham L. Rev.} 1567 (2003) (arguing for the use of honor as a restraint on underhanded discovery tricks).

\textsuperscript{193} \textit{Id.} at 1569.

\textsuperscript{194} \textit{Id.} at 1577-78 (citations omitted).

\textsuperscript{195} \textit{Id.} at 1577.
Thus, where the institutional problem in enforcing a norm of truth-telling is the lack of enforceability, the issue for non-institutional means of enforcement is one of scale and embedding. If lawyers are to effectively inculcate and enforce the norm of truth-telling in the face of temptations and justifications for lying, means must be found to effectively shrink the scale of relationships and embed lawyers in smaller communities.

VII. REDUCING THE SCALE

The increase in the size of law firms noted by Wendel has meant a decrease in the frequency and intensity of mentoring—personal relationships in which more experienced lawyers guide their less experienced colleagues in professional and ethical conduct—within those firms.\(^{196}\) Associates and partners are simply too busy billing hours and bringing in clients to provide the kinds of advice and oversight they once provided.\(^{197}\) In addition, the elimination of apprenticeship requirements in favor of formal law schooling has meant that lawyers no longer serve “under” a more experienced practitioner during their early professional formation.\(^{198}\) For a number of years now, law schools have sought to regain aspects of mentoring and apprenticeship through clinical programs in which law students can gain practical experience and develop habits of professionalism.\(^{199}\) In addition, some wider movements toward re-establishing smaller scale social networks within which younger lawyers can learn from the experience of more practiced attorneys have begun surfacing.\(^{200}\)

Among the more prominent attempts at re-establishing practical relationships between more and less experienced attorneys with the aim of providing practical guidance on professionalism and ethics are law firm mentoring programs, Georgia State Bar Association requirements, and the American Inns of Court. Law firms seeking to lessen costs associated with lawyer dissatisfaction and attrition have reinstituted both

\(^{197}\) Id. at 56-57.
\(^{200}\) See generally Oseid, supra note 198.
formal and informal mentoring programs that have received positive reactions from mentees. 201 The State Bar of Georgia has implemented a program, mandatory for all lawyers admitted to practice in the state after June 30, 2005, under which the Georgia Supreme Court assigns an experienced attorney to serve as a mentor to each new lawyer during the first year of practice. 202 Mentor and mentee must establish a “Mentoring Plan” by which the new lawyer will develop professional skills and values, in part through consultation with the mentor, who must certify completion of the Plan at the end of the year. 203 “At least two states, Alabama and Ohio, have adopted pilot mentoring programs” of their own. 204

Most relevant to our purposes, here, is the formation of the American Inns of Court. Often described as the brainchild of former Chief Justice Warren Burger, from their inception the American Inns of Court have deviated substantially from the model of lectures and question-and-answer sessions first envisioned by Chief Justice Burger. 205 Rather than a single, large national lecture organization, the American Inns of Court was rooted in the desire to bring an apprenticeship model to the United States through “small collegial groups with continuous interaction to pass on skills, knowledge, dedication, civility, and the like, from seniors to juniors.” 206 This “required that many small Inns be organized to meet local needs.” 207 Since 1980 more than 400 Inns have been formed across the nation, 208 which include more than 25,000 judges and lawyers (along with some law professors and law students). 209

Aside from holding monthly meetings, each Inn, in keeping with its apprenticeship model, includes “pupillage teams” of several young and several more experienced lawyers who meet informally. 210 Our purpose is not to advertise for the American Inns of Court (of which neither of us is a member), or any other specific organization. But we

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201. See id. at 404 and accompanying notes.
202. Id. at 405.
203. Id.
204. Oseid, supra note 198, at 405.
206. Id. at 112.
207. Id.
208. Id. at 114.
209. Oseid, supra note 198, at 403.
210. Id.
note in closing several aspects of the American Inns of Court that seem to aim toward solving the problems of scale and embedding that are so troublesome for the enforcement of the norm of truth telling. By forming Inns within various small geographical areas, this model reduces the scale of the “market” for reputation effects. By including judges as well as lawyers it provides a social network aspect that allows judges not only to impart their experience and values, but also to see how and whether ethical habits are being learned and to lend their prestige to the social network itself. In this way Inns of Court (or similar social networks) can set themselves up as exemplars and even arbiters of best practices, encouraging other attorneys to join up or accept the standards adopted by the membership so as to maintain their own reputations within the legal community and among its clientele.

Obviously there is the danger of any social network devolving into a kind of “old boy network” of insiders who favor one another out of mere habitual loyalty. But this danger, in our view, is more than offset by the centrifugal forces so prevalent in our legal marketplace and by the potential for resuscitation of practical norms that can rebuild trust among lawyers and between lawyers and other members of society. Of central importance, in our view, is the cultivation of norms, especially of truth telling, in small, face to face relationships, and their enforcement in social networks of the scale and embedding character necessary for the functioning of reputation effects.