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Truthfulness and Honesty among American Lawyers: Perception, Reality, and the Professional Reform Initiative

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TRUTHFULNESS AND HONESTY AMONG AMERICAN LAWYERS: PERCEPTION, REALITY, AND THE PROFESSIONAL REFORM INITIATIVE

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I. INTRODUCTION: THE PUBLIC'S (MIXED) PERCEPTION OF THE LEGAL PROFESSION AND THE PROFESSION'S (MIXED) RESPONSE

Readers who are holding in their hands an Article written for a law review symposium on "professionalism" probably need little or no convincing that the reputations of American lawyers and of the justice system as a whole have been in

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Although I was invited by the Editors of the South Carolina Law Review to contribute this Article because of my position as Reporter for PRI, the Article expresses my views, and is not an official PRI document or report. Nor does it express views approved or endorsed by the NCBP, which sponsors and presents diverse programs of interest to bar leaders without necessarily reviewing or approving the content of those programs. When I do quote or paraphrase public documents or materials issued by PRI, however, I have taken care to note that I am doing so.

I would like to thank Professor Roy Stuckey of the University of South Carolina School of Law for taking an interest in the work of PRI and insisting that this Article be written, to the staff of the South Carolina Law Review, especially Stewart McQueen, Tom Andrews, Cordes Ford, and Neil Batavia for providing research assistance in addition to normal editorial work, and to the members of the PRI for allowing me to participate in their splendid endeavor.

steady decline for many years.[1] Although the public's sentiment about lawyers has been more positive at certain times during the history of our country,[2] this manifestly is not one of those times. Survey after survey of public opinion shows lawyers gradually slipping below politicians and journalists, and even approaching car salesmen and advertising executive levels in the public's esteem.[3]

It will also come as no surprise to most readers that this well-documented decline in public respect is in significant measure attributable to the public's sense that lawyers are not *trustworthy*.[4] Or, to put less fine a point on it, that too many lawyers lie too much. For example, the premise of the popular film *Liar Liar*[5] is that lawyers *must* lie *in order to function as lawyers*; a lawyer who has a spell cast on him and cannot lie is effectively struck dumb. This premise no doubt resonated with members of the audience, and it is hard to image anyone in contemporary America wondering why the main character was cast as a lawyer rather than as an architect or a biologist. Sadly, this is the film version of the joke that one can tell whether a lawyer is lying by checking to see if his lips are moving. Sadder still, the public already knows the punch line.

Beyond outright lying—and putting to one side traits that might be linked to other professionals, such as greed, arrogance, and limited ability to communicate with laymen—the public is also dismayed by what it regards as other manifestations

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1. *See, e.g.*, Symposium, *Improving the Professionalism of Lawyers: Can Commissions, Committees, and Centers Make a Difference?*, 52 S.C. L. REV. 443 *passim* (2001)[hereinafter *Professionalism Symposium*]; Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1344 & n.15 (1997) (listing various commentators who agree with the proposition that professionalism displayed by attorneys has declined dramatically in the last twenty-five years).

2. *See, e.g.*, CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 211-39 (R.H. Helmholz & Bernard D. Reams, Jr., eds., William S. Hein & Co., 1980) (1911) (describing the sudden revival of public distrust of lawyers after the conclusion of the Revolutionary War).

3. *See, e.g.*, The Gallup Organization, *Honesty/Ethics in Professions*, *at* http://www.gallup.com/poll/topics/hnsty_ethcs.asp (last visited Mar. 29, 2002) (listing results for the 2001 poll); *see also* Deborah L. Rhode, *Opening Remarks: Professionalism, Professionalism Symposium*, *supra* note 1, at 467-68 & n.56 (providing further support for this proposition); Chris Klein, *Poll: Lawyers Not Liked*, NAT'L L.J., Aug. 25, 1997, at A6 (noting that the prestige of lawyers has plummeted during the past twenty years); Randall Samborn, *Tracking Trends*, NAT'L L.J., Aug. 9, 1993, at 20, 20 (tracing various polls since 1976 dealing with the public's declining respect for lawyers). A recent article summarized Gallup Poll results from 1976 to 1998 dealing with honesty and ethics in the legal profession. Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 539-40 & nn.34-35 (2000). According to these polls, 25-27% of those polled gave lawyers high or very high ratings for honesty and ethics between the years of 1976 and 1985. *Id.* at 539. That figure fell to 18% in 1988, rose slightly during the years of 1989 and 1991, dropped back to 18% in 1992, and eventually reached 14% in 1998. *Id.* at 539-40.

4. *See* sources cited *supra* note 3; *see also* Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 62 (noting that barely one in five people surveyed described the legal profession as honest and ethical).

5. LIAR LIAR (Universal Pictures 1997).

of lawyer deviousness: evasion, obfuscation, misdirection, "spinning,"[6] and all manner of "loophole lawyering," to say nothing of willingness to advance frivolous claims or defenses.[7]

At the same time, other less well-known surveys show that more focused questions about the attributes of individual lawyers—especially the lawyer of the person responding to the survey—yield less bleak results.[8] After all, when one's *own* lawyer is busily "taking advantage of loopholes and technicalities," it is much easier to think kindly of the practice, and to re-characterize it as "standing up for a client's rights," whether in criminal, civil, or transactional matters. Moreover, the public has some awareness of the historical role that lawyer-statesmen in both the public and private sectors have played in fashioning and operating our great

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6. Public consciousness of this form of "lying" most commonly arises in connection with closing arguments in high profile criminal cases. (The lawyer joke version features a defendant charged with sodomy whose lawyer argued to the jury that at most his client was guilty of the traffic offense of "following too closely.") Among the best known real examples are the insinuation in the O.J. Simpson criminal trial that the defendant's post-arrest blood samples had been sprinkled at the crime scene or substituted in the crime lab, and the argument in the Reginald Denny assault case arising from the riot that followed the acquittal in state court of police officers who had beaten ex-convict Rodney King, that one of the defendants had actually been trying to *protect* the victim from assault by others (by holding him down with a foot on his neck, as the videotape of the incident clearly showed).

But see William Hodes, *Rethinking the Way Law is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns To Aim Better?*, 87 KY. L.J. 1019, 1033-34 (1999) [hereinafter Hodes, *Aim Better*] (arguing that such tactics ought to be considered legitimate and even mandatory in the service of a client, because the lawyers are not *testifying* falsely—which would indeed be "lying"—but merely making arguments that the government is free to counter, and that the jurors are free to reject). *See also Professionalism Symposium, supra* note 1, at 538-39 (comments by Professor Jack Sammons distinguishing between a duty to be honest about "brute facts," and a duty to be "forthcoming"). The former is well established under existing rules of professional ethics, whereas the latter not only does not exist, but cannot exist under our adversary system as it is currently constituted (at least at the trial level).

Although the author of the *Aim Better* article (and this Article) is now the Reporter for the PRI, the above distinction between *testifying* falsely and making arguments that the lawyer hopes will lead *someone else* to a false conclusion is not a distinction that PRI endorses. Indeed, as will be seen, it is probably fair to say that the most difficult issue PRI faces, both as a matter of policy and as a matter of tactics, is how broadly or narrowly to define the "lying" that it seeks to eliminate from the legal profession, and even then, which forms of lawyer dishonesty deserve the most immediate attention. *See infra* Parts II, III.

7. Even though it is now several years old, the case of the elderly New Mexico woman who recovered a large compensatory and punitive damages jury award from McDonald's Restaurants, after spilling a scalding hot cup of take-out coffee on her lap while driving, still resonates with the public, including social critics and television comics. *But see* Hodes, *Aim Better*, *supra* note 6, at 1035-36 n.43 (agreeing that lawyers are forbidden—by Federal Rule of Civil Procedure 11 and *Model Rules of Professional Conduct* Rule 3.1, for example—from advancing frivolous claims, but suggesting that the claim in question might not have been frivolous, taking into account the track record of that particular restaurant chain, and the failure of the court to grant summary judgment for the defendant).

8. *See, e.g.*, Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1417 & n.60 (1999) (citing two surveys for the proposition that "people's disparaging attitudes toward lawyers in general has not caused them to lose confidence in their own lawyers"); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808 & nn.12-19 (1998) (summarizing results of polls indicating that over 50% of adults are satisfied with the services that their lawyers provide).

democracy[9]—from the Founding Fathers forward, including such events as the development of the administrative state during the New Deal, and the civil rights movement that began in the 1950s.

If one takes a weighted average of public sentiment, however, or somehow finds its center of gravity, it is clear that the contemporary overall verdict is negative. Moreover, even if this public vote of no confidence were based on wholly erroneous or fanciful considerations, the situation would still be intolerable for those who care about the legal profession, and would still cry out for remedy. In our constitutional democracy, where lawyers are the chief means of access to the legal system with respect to both public disputes and private transactions, the rule of law itself is at risk if lawyers are bypassed as not sufficiently respected to play this crucial role.[10]

Over the past twenty years or so, the organized bar has responded in a variety of ways to the challenges that the public and critics within the legal profession—including academic critics—have laid down. Some bar leaders have claimed that the public's disaffection with lawyers dates back to the founding of our country and before, and is in any event based largely on lack of understanding of what lawyers do, and why they do what they do.[11] Furthermore, the public is largely ignorant, it is said, of the positive contributions that lawyers make to society generally, even beyond the indispensable work they perform for their clients (who collectively make up our body politic in any event).[12]

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9. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 11-13 (1993).

10. This was the essential point of the National Conference on Public Trust and Confidence in the Justice System, which was held in May 1999 in Washington, D.C. Approximately 500 delegates attended the conference, which was jointly sponsored by the Conference of Chief Justices, the American Bar Association (ABA), the League of Women Voters, and the Conference of State Court Administrators. *See* http://www.ncsc.dni.us/ptc/ptc2.htm (last visited Mar. 29, 2002).

One of the co-chairs of the Conference was Thomas A. Zlaket, Chief Justice of the Arizona Supreme Court. As will be seen, Chief Justice Zlaket soon became one of the prime movers in the formation of the Professional Reform Initiative and is still one of its most active members and spokesmen. *See infra* notes 31-32 and accompanying text. It is probably correct, therefore, to count the 1999 Conference as one of several inspirational points for the development of PRI.

11. *See generally* PAUL G. HASKELL, WHY LAWYERS BEHAVE AS THEY DO (1998) (explaining the professional rules that permit or require certain conduct by lawyers that laypersons may find unethical); STEVEN LUBET, NOTHING BUT THE TRUTH—WHY TRIAL LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH (2001) (demonstrating that lawyer storytelling is a legitimate technique for determining truth, and for providing the best defense for a client). Both of these books were written by law professors, but largely for a lay audience.

12. *See, e.g.*, Paul J. Kelly, Jr., *A Return of Professionalism*, 66 FORDHAM L. REV. 2091, 2096 (1998) ("I do look forward to the day when the public . . . stop[s] blaming the profession for the perceived ills afflicting our society and recognize[s] the contribution that the American legal system and the American lawyers have made and continue to make not only to the American people but to the world at large."); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 289 (1998) ("The profession's most common response to popular criticism is to deny its validity. Over half of some 2800 surveyed lawyers, judges, and law students believe that the public's negative perception of the profession is 'due to its ignorance . . . .'") (footnote omitted).

For those who take this view of the problem of declining respect for lawyers and of the justice system itself, a solid countermeasure is to engage in public relations campaigns designed to educate the public about just such matters, and to improve the image of lawyers in the process. That is a chief reason why there are so many local, state, and national initiatives, including non-binding codes, creeds, and "rules of the road," exhorting lawyers to practice various forms of civility and professionalism, and to preach to fellow lawyers along the same lines.[13]

Another approach is to remind members of the public that they may themselves have need of legal services in the future, and that when that day comes, they too will want and deserve the protection and the freedom of action that engaging a good lawyer brings. After all, one man's "hired gun Rambo lawyer" is another man's "hard-nosed and loyal advocate," as suggested earlier, "a champion against a hostile world."[14] Or, as Sir Thomas More famously challenged William Roper, a man with little imagination and an all consuming rectitude, saying:

> This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[15]

Still another approach, favored by bar leaders worried about the legal profession's image, is to remind the public about the various *pro bono publico* efforts mounted by many individual lawyers, law firms, and local bar associations, as well as other community programs such as volunteer work with the elderly, prison inmates, immigrants, and "ask a lawyer" hotlines and educational programs about the law presented at the grade school and high school levels.

To be sure, professionalism and community service programs have been criticized by some as little more than late-arriving and ultimately self-serving window dressing and by others as not addressing directly enough public complaints about our profession.[16] More significantly, perhaps, still others have suggested that there is danger that creating a "kinder and gentler" corps of lawyers can be

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13. The *Professionalism of Judges and Lawyers* website, a project of the University of South Carolina School of Law's Nelson Mullins Riley & Scarborough Center on Professionalism, provides links to various national, state, and local professionalism standards, codes, and creeds. *See* http://www.law.sc.edu/profcenter/main/materials/dsppscc.htm (last visited Mar. 28, 2002).

14. *See* MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 16 (1990) (citing A.B.A., *Standards Relating to the Defense Function* 145-46 (Approved Draft, 1971)).

15. ROBERT BOLT, A MAN FOR ALL SEASONS 66 (1962).

16. *See* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 *passim* (1995); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 *passim* (1994); Deborah L. Rhode, *Opening Remarks: Professionalism, Professionalism Symposium, supra* note 1, at 467-71; Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149 *passim* (1987); Jay Sterling Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 55 OHIO ST. L.J. 855, 869-70 (1994).

accomplished only at the expense of stifling *legitimate* advocacy and client-regarding representation, thus harming clients of individual lawyers.[17] Nonetheless, there is plainly some merit to the view that the public's perception of lawyers is simply inaccurate—at least with respect to some aspects of lawyers' work.[18] To the

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17. *See* Hodes, *Aim Better*, *supra* note 6, at 1032 ("[I]t may be a dog-eat-dog world, but one dog may eat another only according to the rules.") (quoting Robert J. Kutak, *The Adversary System and the Practice of Law*, *in* THE GOOD LAWYER 172, 175 (David Luban ed., 1983)). "Some critics simply disagree that service to clients through use of all legal means is morally inferior to client service that takes into account the greater public good. . . . [and] that too vigorous a campaign for professionalism and civility is but the first step towards legalization of the wrong norms." GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.6, at 1-12 (3d ed. 2000) (emphasis omitted). When powerful lawyers and judges "exhort other lawyers to engage only in conduct that they believe is morally superior, the exhortations can have a coercive effect." *Id.* For example, there are troubling cases where lawyers acted within the bounds of the rules of procedure and rules of ethics, but were nonetheless chastised by the courts. *Id.* at 1-12 & n.10 (citing *Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97 (Mo. 1989) as an example).

In *Sprung*, the plaintiff was awarded a final default judgement when, because of a series of clerical errors, the defendant failed to serve an answer to the complaint or a request for extension of time. *Id.* at n.10 (citing *Sprung*, 775 S.W.2d at 99-102). The plaintiff knew that the defendant believed that all necessary answers had been filed, but the plaintiff directed his lawyer not to inform the defendant of his mistake until after the deadline to file a motion to set aside the default. *Id.* (citing *Sprung*, 775 S.W.2d at 100-01). The defendant eventually filed the motion; however, the trial court refused to set aside the default judgment and was upheld by a closely divided Missouri Supreme Court. *Id.* (citing *Sprung*, 775 S.W.2d at 99-102). The plaintiff's lawyer was chastised by the dissenting justices for concealing the fact of default from the defendant. *Id.* (citing *Sprung*, 775 S.W.2d at 105-06 (Robertson, J., dissenting), 109-13 (Blackmar, C.J., dissenting), 114-15 (Welliver, J., dissenting)). The dissenting justices characterized this behavior by the plaintiff's lawyer as "deceptive conduct or deceptive silence" which was the "the legal equivalent of fraud." *Id.* (citing *Sprung*, 775 S.W.2d at 110 (Blackmar, C.J., dissenting)). Chief Justice Blackmar stated:

> I accept the proposition that a lawyer has a duty to advance his client's interest by all honorable means, and would reject any suggestion that "professional courtesy" should prevail over the lawyer's duty to his client. . . . But I would stop short of taking advantage of a mistake known to me.

Id. (citing *Sprung*, 775 S.W.2d at 110 (Blackmar, C.J., dissenting)) (emphasis omitted).

Justice Benham of the Georgia Supreme Court, fearing that every claim of unprofessional conduct would lead to a malpractice claim, opined: "Unbridled and blind advocacy could become the order of the day *and the professionalism movement . . . would be dead in the water.*" Allen v. Lefkoff, Duncan, Grimes, & Dermer, P.C., 453 S.E.2d 719, 722 (Ga. 1995) (Benham, J., concurring). Professor Monroe Freedman responded saying that "it follows, of course, that the success of the professionalism movement would leave zealous advocacy no less dead." Monroe Freedman, *The Ethical Danger of "Civility" and "Professionalism,"* CRIM. JUST. J., Spring 1998, at 17, 18.

18. For example, it is rank and inexcusable lawyer-bashing to perceive lawyers as "dishonest" and not to be trusted *because* they defend (and sometimes help set free) criminal defendants whom they know to be factually guilty. If lawyers could not defend such clients, the rule of law and the system of trial by jury would be overthrown, and an ad hoc, extra-constitutional system of "trial by lawyer" substituted in its place.

Similarly, the views of people who claim that lawyers will do "*anything*" to advance a client's cause should be given little weight, for they are no doubt generalizing from a very small base of anecdotal information, some of it fictional to boot. More important, they are simply misinformed about the extent to which *existing* rules regulating the conduct of lawyers puts certain conduct out of bounds—such as lying, suborning perjury, fabricating evidence, and so on. *See infra* notes 43-45 and accompanying text.

Unfortunately, it is not only lay people who harbor such peculiar views of the proper role of

extent that this is so, it would be wrong to pander to popular lawyer-bashing sentiment; instead, public education about the nature of the legal system, and the sometimes-unlovely role that lawyers *legitimately* play in it, can be a sound component of a campaign to enhance public trust and confidence in the justice system.

On the other hand, some bar leaders have come to realize that the public cannot bear all of the blame for its mistrust of lawyers, and its perceptions cannot all be dismissed as "clearly erroneous," to borrow a legal phrase. The disheartening reality is that among lawyers—who once claimed honesty and integrity as their stock-in-trade, and who once proudly asserted that their word was their bond—too many are *rightly* seen as untrustworthy. Too many unscrupulous lawyers wrap themselves in the flag of "zealous advocacy" in an attempt to justify dishonest conduct that is actually *prohibited* by the rules regulating lawyer conduct.[19]

These lawyers forget—or conveniently pretend to forget—that the watchword of ethical practice is "zealousness *within* the bounds of law," and that practicing according to "law" includes obedience to the rules of professional conduct and other norms governing the work of lawyers,[20] many of which already *require* honesty and truthfulness.[21]

When clients, judges, and other lawyers encounter even a few instances of lawyer dishonesty,[22] the system can descend into a spiral of mistrust and

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lawyers. *See* Hodes, *Aim Better*, *supra* note 6, at 1029-30, 1042-50 (discussing the strain of lawyer-bashing attitudes prevalent among some elite lawyers, including some judges and academics).

19. PRI has developed a resource book for use by local and state bar associations in their efforts to mount professional reform campaigns along the lines suggested by PRI. NAT'L CONFERENCE OF BAR PRESIDENTS PROF'L REFORM INITIATIVE, ENHANCING TRUST IN THE LEGAL PROFESSION: PUTTING THE PROFESSIONAL REFORM INITIATIVE TO WORK IN YOUR BAR (2002) (unpublished, current version on file with South Carolina Law Review) [hereinafter ENHANCING TRUST IN THE LEGAL PROFESSION]. One resource included in the book is a compendium of *existing* rules set out in the *Model Rules of Professional Conduct* that require honesty and candor of lawyers, even those involved in contested litigation matters. *Id.* at tab 7. Immediately following that listing is a sampling of cases in which those rules have actually been *enforced*, in disciplinary matters and in connection with private party litigation. *Id.* at tab 8.

20. *See* HAZARD & HODES, *supra* note 17, at §§ 1.3, 6.2.

21. This is not to say that such rules cannot be strengthened, or that enforcement efforts cannot be stepped up. One of PRI's earliest projects was to present a package of suggested amendments to the *Model Rules of Professional Conduct* along these lines to the American Bar Association Ethics 2000 Commission, which was tasked to revise the *Rules* as needed. PRI's submission is included in its resource book. ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19, at tab 9. The most important proposals, which concerned whether the word "material" ought to be deleted from rules prohibiting lawyers from making false statements of law or fact, are discussed below. *See infra* notes 52-53 and accompanying text.

22. One resource that PRI has been developing since its very inception is *An Inventory of Impediments to Lawyer Truthfulness and a Catalog of Incentives to Lawyer Dishonesty*, now divided into five segments: dishonesty with respect to clients, dishonesty with respect to courts, dishonesty with respect to other lawyers, dishonesty with respect to the public, and dishonesty in the law school context. When it has been reduced to final form, it will be included in the resource book that PRI has developed for use by local and state bar associations. *See* ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19.

inefficiency, as every point of consequence must be double-checked rather than taken at face value.

As some bar presidents at the state and local levels began to point out in their monthly columns, puffery in negotiation can blend into outright lying, exaggeration of time spent on a client's matter can become outright theft when hours are fabricated out of whole cloth, and not only must lawyers insist upon receiving written confirmation of oral agreements, but they must check carefully to see that the writing accurately states the agreement reached.[23]

The public's loss of faith in the legal professional, in other words, is not all a matter of perception. It is in part a matter of reality, and something more than public relations moves are needed to change the reality, so that perception will eventually follow suit.

Early in 2000, the Professional Reform Initiative (PRI) was formed as a project of the National Conference of Bar Presidents (NCBP),[24] under a planning grant from the Open Society Institute of the Soros Foundation, to move forward with suggestions and programs that would take this more active approach to re-establishing public trust and confidence in the justice system.[25] Not coincidentally, PRI's first project has been to emphasize a return to truthfulness and honesty as the core of the profession's core values, on which all else depends.[26]

Put another way, PRI's ambitious first project is to promote a policy of zero tolerance for lying throughout the legal profession—a prescription that some members of the bar have found to be unduly strong medicine, both before and after the launch of PRI. However, such reforms are needed not only to improve the quality of justice in the United States, but also to nourish the long-term health of the legal profession itself.

II. FORMATION AND DEVELOPMENT OF THE PROFESSIONAL REFORM INITIATIVE

Although the PRI was not formally established until early in 2000, its genesis can be traced through several educational programs conducted by the NCBP during the middle 1990s. Individuals in the organization who were working towards the more direct and active kinds of reform efforts described earlier[27] also established working relationships with like-minded people in the Conference of Chief Justices,

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23. Several of these columns have been reprinted in the resource book that PRI has developed for use by local and state bar associations. ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19, at tab 3.

24. The NCBP is an organization that includes the leaders of all state bar associations and many of the larger city, county, and other local or regional bar associations. The membership of the bar associations thus represented in the NCBP considerably outnumbers the membership of the ABA.

25. ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19, at tab 1.

26. *Id.* At its initial planning session, held in Tucson, Arizona in April 2000, PRI discussed reform efforts directed at other reasons for the public's loss of faith in the legal profession and in the justice system, such as escalating costs, long delays, and disgust with the uncivil atmosphere prevailing in many courtrooms. A consensus was quickly reached, however, that a campaign directed at eliminating or reducing lawyer dishonesty and untrustworthiness deserved primacy.

27. *See supra* notes 19-26 and accompanying text.

the National Center for State Courts, the American Bar Association Center for Professional Responsibility, and the National Association of Bar Executives.

In particular, Atlanta lawyer Seaborn Jones, former President of the Atlanta Bar Association and President of the NCBP for 1999, was responsible, along with others on the NCBP Executive Council,[28] for presenting a series of programs at the organization's bi-annual meetings (which are always held in conjunction with the annual and mid-year meetings of the ABA). At the mid-year meeting in Miami in 1995, for example, a program entitled *The Practice of Law—What's Broken or Bent: The Role of Bar Associations in the Repair Business*,[29] was presented, at which many ideas that subsequently animated PRI were advanced.

That summer, at the annual meeting in Chicago, a follow-up program was aimed at finding solutions for the problems identified at the Miami session, and in 1996, the dialogue within the NCBP continued in Orlando, at a program entitled *The Role of the Bar in Relation to the Profession, the Judiciary and the Community: Movers and Shapers of Changes in the Legal and Judicial Systems or Increasingly Irrelevant?*[30]

As described in Part I of this Article, the response of the organized bar to criticism of lawyers and lawyers' behavior has often been decidedly mixed. Not surprisingly, therefore, the earliest efforts of what would later become PRI met with the same mixed reaction.

Some bar leaders, including some in leadership positions in the NCBP, feared that acknowledging a serious problem with untruthfulness by lawyers would merely fan the flames of the society-wide lawyer bashing that was already rampant. Indeed, they feared that even a positive campaign to strengthen and enforce *existing* rules against lying might merely generate negative publicity and embarrassing headlines: "Bar group admits lawyers are untrustworthy; campaign to curb lying lawyers proposed." Anything other than rosy accounts of lawyer *pro bono publico* activities and other forms of public relations "cheerleading" were dismissed as "lawyer bashing from within."

On the other hand, the NCBP programs were well attended and did not cause any firestorm of protest among the nation's bar presidents. Even those not immediately (or already) convinced of the need for long term and thorough reform were willing to discuss the problems in a sober and clear-eyed fashion. Thus, more than anything else, the NCBP sessions convinced the proponents of more active reform that the bar *can* openly face up to whatever is valid in public criticism of the

28. Other active individuals included: David S. Houghton of Omaha, Nebraska, President-Elect of the NCBP; Randall Cooper of North Conway, New Hampshire, NCBP Member-at-Large; and Douglas Lang of Dallas, Texas, Secretary of the NCBP. All of these active participants in the earlier NCBP programs later became members of PRI.

29. National Conference of Bar Presidents, The Practice of Law—What's Broken or Bent: The Role of Bar Associations in the Repair Business (1995) (copy on file with author).

30. National Conference of Bar Presidents, The Role of the Bar in Relation to the Profession, the Judiciary and the Community: Movers and Shapers of Changes in the Legal and Judicial Systems, or Increasingly Irrelevant (1996) (copy on file with author).

legal profession, the sky will not fall, and, more important, the hard work of reform should move forward.

Accordingly, despite the doubts of some, the NCBP continued to sponsor such programming, and to provide state and local bar presidents with food for thought about serious reform efforts as they returned to their constituencies. For example, Chief Justice Thomas Zlaket of Arizona, already a prominent voice of reform on the Conference of Chief Justices,[31] and a frequent and forceful speaker about the problem of lack of truthfulness in the legal profession in particular, electrified the NCBP audience at the August 1999 annual meeting in Atlanta.[32] The interest and enthusiasm generated by that speech was a major factor in the subsequent creation of PRI.

Considering these and similar activities of other organizations, including the Open Society Institute of the Soros Foundation, which had supported many educational and other projects focusing on the American justice system, it is fair to say that by the fall of 1999, there was significant interest in professional reform, and some momentum generated in that direction as well. Accordingly, with President Seaborn Jones again taking the lead, the NCBP applied for a planning grant from the Open Society Institute to establish the Professional Reform Initiative.

The single most important point of the grant application was that because bar presidents serve for only one year, a semi-permanent group dedicated to long-term reform was needed to serve as a resource center and sounding board, so that reform-minded presidents would not have to reinvent the wheel each time they came into office. Instead, PRI would develop programs and materials that could be used to

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31. Chief Justice Zlaket had been instrumental in convening the National Conference on Public Trust and Confidence in the Justice System, which was held in May 1999 in Washington, D.C. *See supra* note 10. One of the co-sponsors of that meeting was the Conference of Chief Justices, which had earlier issued a national plan of action on professionalism issues. CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM, *available at* http://www.ncsc.dni.us/ccj/natplan.htm (last visited Mar. 29, 2002). The plan included discussion of ways in which the bench, bar, and law school communities could coordinate efforts at both education and enforcement to improve the performance of lawyers and the quality of justice in our legal system. *Id.*

32. Later, Chief Justice Zlaket became a founding member of PRI and one of its most active participants and spokesmen. *See, e.g.*, *Professionalism Symposium, supra* note 1, at 491-94, 533-35 (faulting, equally, "a profession in denial" about the extent to which lawyers lie in everyday practice, and judges too disengaged or too timid to do anything about it). In addition, he made a further presentation to an NCBP audience at the 2000 mid-year meeting in Dallas, Texas, excerpts of which have been included on a videotape that PRI has available for use by local bar associations.

Lawyer and cultural anthropologist Roberta Katz also became a founding member of PRI. Her 1997 book had pinpointed lack of truthfulness as one of the chief factors leading to the breakdown of the American adversary system. *See* ROBERTA KATZ, JUSTICE MATTERS: RESCUING THE LEGAL SYSTEM FOR THE TWENTY-FIRST CENTURY 43-46 (1997). Her talk to an NCBP Plenary Session at the 2001 mid-year meeting in San Diego was entitled *Truthfulness—Lawyers' Stock and Trade*. Roberta Katz, Address at National Conference of Bar Presidents, Mid-Year Meeting in San Diego, California (2001) (copy on file with author). Some of her later comments were filmed and included in PRI's educational videotape.

encourage or advance local reform efforts, with or without further modification to fit local conditions.

Moreover, because the proposed PRI would include representatives from other segments of the legal profession, such as the judiciary and the legal academy, as well as lay participation, not only would the best thinking be brought to bear on the long-term issues that PRI wanted to tackle, but it would have access to available resources across a broad spectrum.[33]

The Open Society Institute approved the initial startup grant (and later extended funding to cover activity at least through 2002). It was then up to PRI to decide which reform efforts to tackle first, and through what means. Meeting in Tucson, Arizona, in April 2000, the founding members of PRI quickly determined that the first project would involve a single-issue campaign to eliminate or significantly reduce dishonesty and untruthfulness among lawyers in their professional conduct.

Several grounds were advanced for this choice, besides the fact that, as described above, the NCBP programs that had led to the formation of PRI had already focused attention on the issue. First, the participants agreed that some lawyers' disregard for the truth is a major factor in the public's current disrespect for lawyers and thus for the justice system itself. That reality had to be met head-on and radically altered in order to restore the public's trust; public relations and public education campaigns, while not unwelcome, would always be insufficient without significant *actual* change in lawyer behavior.

Second, not only is being lied to disheartening, wearisome, and wasteful of both time and energy, but being a lawyer *who feels compelled to lie* is so corrosive to the spirit that it must be part of the professional discontent experienced by so many lawyers at all stages of their respective careers. Third, restoring trust to the legal system and trustworthiness to lawyers is necessary not only to the maintenance of an independent legal profession, but also to its very survival. Unless the organized bar cleans its own house, sooner or later government agencies will remove the unique measure of self-regulation granted to the legal profession and step in to clean it for us.[34]

PRI also quickly reached consensus about how it would attempt to accomplish its goal. There was initial agreement that little progress could be made without significantly enhanced enforcement by the courts and disciplinary agencies of

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33. In addition to the several persons already named as having been founding members of PRI in notes 28 and 32, *supra*, the original group also included Judge Sandra Lynch of the United States Court of Appeals for the First Circuit, former ABA President William Ide, Charlotte (Becky) Stretch of the ABA Center for Professional Responsibility, who was also a member of the Ethics 2000 Commission and had close ties to the ABA Standing Committee on Professionalism, and retired businessman James Steele of Boise, Idaho. When I was engaged as the Reporter for PRI in the spring of 2001, I was no longer an academic, having returned to private practice, but I had had some twenty years of experience as an academic in the field of legal ethics and "the law of lawyering," and my new practice was limited almost exclusively to that area, in any event.

34. *See, e.g.*, Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1230-33, 1267-76 (1995) (arguing an approach that would substitute government regulation for self-regulation).

existing norms providing for truthfulness, but that the judiciary—especially where it is elected—could not in turn make progress without support and encouragement from the local bar associations. This meant that PRI would have to convince key elements in the organized bar and the judiciary that the problem of lying by lawyers was both real and serious, and that it was in the interests of both to dedicate significant resources to eliminating the problem.

At the same time, a concerted effort would have to be made to change the baseline culture in which individual lawyers operate. Thus, while dedicated service to clients, including zealous advocacy, is commendable, lawyers must remember that this is to be accomplished *within the bounds of law*, which means without falsehood.[35] This also suggested that a major component of PRI's work would be outreach efforts to the law school community, to help ensure that young lawyers entering the profession would have a proper understanding of the role of truthfulness in lawyering, and would *internalize* this key professional value.

For the rest of 2000 and through the end of 2001, PRI concentrated its efforts on three main projects to advance its agenda. First, PRI made a submission to the Ethics 2000 Commission, suggesting amendments to the *Model Rules of Professional Conduct* conducive to enhancing truthfulness among lawyers.[36] Second, PRI developed and continually updated and re-issued a resource book that could be used by bar leaders, members of the judiciary, and law school personnel interested in mounting a reform effort along the lines advocated by PRI.[37]

The book includes material on oaths for admission to the bar stressing truthfulness and honesty, examples of cases enforcing *existing* rules against lying, both in disciplinary matters and in private party litigation, and a recommended pre-trial charge to lawyers and litigants regarding the value of truth in the courtroom.[38]

Finally, through Internet contacts, outside speaking engagements, presentation of further programs at NCBP meetings, and other outreach efforts, PRI has encouraged the establishment of several pilot projects at both the state and local levels. People associated with these projects have in turn begun to bring their experiences back to PRI, so that PRI can serve its clearinghouse function and further advance such reforms.

III. HONING PRI'S MESSAGE AND WRITING ITS RESOURCE BOOK: CHARTING THE DISTINCTION BETWEEN LYING, MISREPRESENTATION, AND MISLEADING, WHILE SOLVING THE EASTER BUNNY PROBLEM

From the moment that the PRI determined to make restoration of lawyers' reputation for truthfulness and honesty its signature issue,[39] it was destined to face

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35. *See infra* notes 42-46 and accompanying text for discussion of *existing* rules against lawyer dishonesty, and PRI's attempts to strengthen them and ensure more vigorous enforcement.

36. *See infra* notes 46 and 53 and accompanying text.

37. ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19.

38. *Id.* at tabs 5, 8, & 10.

39. *See supra* note 26 and accompanying text.

a series of tactical or "political" issues, as well as several challenging substantive issues that go to the very heart of defining what it means—or ought to mean—to be a lawyer functioning in the American legal system today.

As described earlier in the Article, PRI had met vigorous opposition from a few bar leaders to its whole project, even during its formative period. When PRI began to engage in significant outreach efforts, it had a burden of persuasion to overcome not only in those quarters, however, but also with respect to lawyers and lay people hearing about the project for the first time.

Always at some risk of being charged with protesting too much, PRI had to convince doubters that it was *not* trying to add fuel to the lawyer-bashing fire, but was instead trying to *enhance* the reputation of lawyers generally by working to restore truthfulness and honesty as the core values most clearly associated with the legal profession. The ultimate goal, after all, was to make *convincing* once again the traditional lawyer adage "my word is my bond," thus increasing public trust and confidence in the justice system.[40]

In this connection, PRI had to toe a delicate line in the work product that it put out for public consumption. On the one hand, PRI members believed (and insisted) that some nontrivial percentage of lawyers really do lie about nontrivial matters, that this phenomenon cannot be ignored, and that it is a sufficiently serious problem to require the systematic and long-term attention of the organized bar. On the other hand, it would be counter-productive—not to mention entirely incorrect—for PRI to leave its intended audience with the impression that lying by lawyers is a "natural" condition, built-in to the very concept of being a lawyer. *That* was the unfunny, untrue, and repellent premise of the film *Liar Liar*,[41] a premise wholly at odds with PRI's view.

A good example of how PRI refined its message in this regard may be found in the Introduction to the resource book that PRI has developed (and still continues to develop) as a major element of its outreach effort to state and local bar associations, the judiciary, and law school groups.[42] The *Introduction* carries the

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40. It will be recalled that one of the prime movers of the National Conference on Public Trust and Confidence in the Justice System, which was held in May 1999 in Washington, D.C, was Chief Justice Thomas Zlaket of Arizona, a founding member of PRI and one of its chief spokesmen. *See supra* notes 31-32. The PRI resource book refers to a simple example often used by Chief Justice Zlaket to illustrate this point: "[T]here was a time when an agreement between lawyers over the phone *never* had to be confirmed in writing, whereas today it is routine." ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19, at tab 1.

41. *See supra* note 5 and accompanying text.

42. ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19, at tab 1. The resource book first appeared in public essentially as an agenda and a limited set of materials to accompany the PRI presentation at the mid-year meeting of the National Conference of Bar Presidents in San Diego in February 2001. At that meeting, PRI presented a major plenary session address on the corrosive effects of lying, by PRI member Dr. Roberta Katz, and then continued with a panel discussion on how local bar presidents might begin to advance reforms of the type PRI advocated.

By the annual meeting, held in Chicago in August 2001, the resource book had been substantially reworked, and consisted of a long introduction and several appendices or "tabs," collecting materials (such as cases, relevant rules of professional conduct, and columns by bar leaders in local bar journals) that could be used to illustrate or validate PRI's positions. ENHANCING TRUST IN THE LEGAL

subtitle "*The Professional Reform Initiative's First Project: Increasing Public Trust and Confidence in the Justice System by Emphasizing Truthfulness and Honesty as the Lawyers' Stock-in-Trade*," and contains the following passage:

> PRI's emphasis on honesty in lawyering treats seriously the complaint of many observers, both from within and without the profession, that the incidence of lawyer dishonesty is on the rise. But PRI's project has nothing in common with lawyer-bashing efforts so pervasive in the culture at large. To the contrary, our goal is to impress upon the judiciary and the public the value that the profession, through its bar associations, places upon truthfulness and honesty.
>
> In other words, despite the assumptions of some members of the public, and despite the claim of a small minority of ethically challenged lawyers, lying is *not* an accepted element of lawyering. *To the contrary, existing rules of professional conduct are crowded with provisions requiring honesty and candor, even as applied to lawyers participating in litigation or other adversarial representation.*[43] Moreover, in many states the oaths of office that newly admitted attorney[s] take include[] specific reference to a duty of honesty and truthfulness.[44]
>
> To be sure, the rules against lawyer dishonesty are not as sharp and unequivocal as they might be, enforcement has been spotty, and sanctions have not always been as stern as they should be in order to achieve deterrence and to remind the public that untruthfulness is indeed antithetical to the legal profession.[45] But PRI and others, including bar leaders, judges, and academics, have worked to strengthen the rules, and to encourage more and better enforcement.[46]

PROFESSION, *supra* note 19.

43. At this point, a footnote in the resource book *Introduction* refers to a tab listing *current* rules of professional conduct requiring truthfulness and honesty in lawyering, such as *Model Rules of Professional Conduct* 3.3(a), 3.4, 4.1, and 8.4(c). ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19, at tab 1 n.2 (citing ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19, tab 7).

44. Another tab in the resource book provides brief treatment of oaths upon admission, noting that while many include a component requiring truthfulness and honesty, many others make reference to a series of vague, subjective, and sometimes internally inconsistent values. *Id.* at tab 10. In the first editions of the resource book, PRI simply recommended that bar associations work with the highest court in their respective states to include or strengthen language about truthfulness and honesty, and provided some promising illustrative language.

45. At this point, a footnote to the *Introduction* stated, "Uneven and insufficiently vigorous enforcement does not mean that the rules are a nullity, however." *Id.* at tab 1 n.4. Another tab in the resource book provides examples of cases in which the rules *have* been enforced, both in disciplinary matters and in private party litigation. *Id.* at tab 8.

46. *Id.* at tab 1. Here, a footnote to the *Introduction* noted that PRI has made suggestions for strengthening enforcement action, and that with respect to strengthening the content of the rules, PRI had made several recommendations to the Ethics 2000 Commission. *Id.* at tab 1 n.5. An excerpted copy

In a nutshell, the tactical problem PRI faced was to negotiate the shoals lying between a clear-eyed analysis that did not shrink from real problems and alarming bar leaders into stunned inaction.[47] In effect, paraphrasing the famous line from the Jack Nicholson film *A Few Good Men*,[48] PRI was asking the organized bar whether it could "handle the truth" *about the truthfulness of American lawyers*.[49]

Beyond the necessarily tactical or "political" positioning just described, surprisingly difficult *substantive* issues arose at every turn—issues on which PRI easily reached consensus with respect to the broad outlines, but on which subtle differences remained. In other words, even assuming that PRI had been ceded complete freedom to establish the regulatory regime that it thought best, the devil would *still* persist in the details. Moreover, concern about how different approaches would be perceived by PRI's intended audience may have in turn further influenced how individuals within PRI sought to shape the answers to these tough questions that PRI would present to the organized bar and to the public at large.

As described below, PRI's *modus operandi* has been to put the most difficult philosophical and jurisprudential issues temporarily to one side and concentrate most of its fire right down the middle, where there is broad agreement—not only within PRI, but also in the bar generally.

Nonetheless, it is instructive to sample some of the issues thus temporarily sidetracked, not least because they are frequently referred to by persons expressing genuine interest in PRI's work. Indeed, the interplay between the short-term need to put forward a manageable program for reform, and the long-term need to contribute to solutions of these dicey issues helped shape the work product that PRI actually put out into the public domain. Consider, for example, the baseline problem of defining "lying" itself.

Certainly, there is strong emotional appeal to a stated policy of zero tolerance for lying, *coupled with a broad definition of lying*. There is also an attractive straightforwardness in refusing to allow for distinctions between active and passive lying, or to permit exceptions for other practices that involve misdirection and

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of those recommendations was added to a later version of the resource book. *Id.* at tab 9.

47. In a subsection to the *Introduction* of the PRI resource book titled *The Size of the Problem*, this passage appears:

> For those at the other end of the spectrum[,] those who believe that this problem is too big or too tough to be tackled successfully[,] we say take heart. The work before you is not nearly so formidable as improving public education or reducing illegal drug usage and associated problems. You can reach . . . a limited group made up of intelligent people, the great majority of whom favor honesty and truthfulness. With the right leadership and a group that dedicates itself to the proposition that honesty and truthfulness are essential to the well-being of our profession and public respect for it, you can bring about positive change. It will take time, but you can do it.

ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19, at tab 1.

48. A FEW GOOD MEN (Columbia Tristar 1992).

49. See the column of the 2001 Kansas Bar Association president, James Bush, using the same Nicholson line in a slightly different sense, but still referring (favorably) to the PRI project. Mr. Bush wondered whether lawyers generally could "handle the truth" *in their daily practice*. James L. Bush, *Truth, Justice, and the American Way*, J. KAN. B. ASS'N, Oct. 2001, at 2.

misleading rather than deliberate falsehood or misrepresentation in the legal sense. In his speeches on behalf of PRI, for example, Chief Justice Thomas Zlaket of the Arizona Supreme Court typically dismisses such distinctions with scorn, claiming that any child above the age of five can instantly spot a lie.[50]

On the other hand, some of the most fervent foes of lying by lawyers maintain that a sensible and workable ban on lying cannot exist without treating such nuances seriously.[51] A simple illustration of these different approaches involves the common example of zero-sum bargaining, as in lawsuit settlement negotiations.

Chief Justice Zlaket is correct that lying in response to a direct question regarding settlement authority is unacceptable, and everyone within PRI agrees. Moreover, although such a lie is prohibited under *existing* rules of professional conduct,[52] the prohibition is notoriously weak, and PRI is not alone in calling to have it strengthened.[53] Yet, if anything (or everything) *other than an immediate and*

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50. Excepts of some of these speeches have been included on a videotape that PRI has available for use by local bar associations. The videotape—still a work in progress—has been distributed to many bar leaders, and more copies will be made available when it is completed.

51. *See* Hodes, *Aim Better*, *supra* note 6, at 1029-42.

52. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1 (2001) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.").

53. Until 2002, the Comment to Rule 4.1(a) said the following about what counts as a fact (and therefore a lie about a fact) in the context of negotiations:

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value . . . [or settlement expectations] are in this category."

Id. R. 4.1, cmt. [2] (2001).

The Ethics 2000 Commission received numerous submissions requesting that this language be replaced by language making it clear that direct lies (about nontrivial matters) in negotiation *always* violate Rule 4.1(a). In its November 2000 Report, however, the Commission merely recommended adding the word "ordinarily" a second time—in the last sentence quoted above. A.B.A., COMM. ON ETHICS 2000, EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT: REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES (2001), *available at* http://www.abanet.org/cpr/ethics2k.html (last visited Mar. 29, 2002) [hereinafter ETHICS 2000 COMM. REPORT]. The Commission also proposed adding a helpful sentence at the end of this Comment, reminding lawyers of their obligations under the law of criminal and civil misrepresentation, which presumably was a reminder that this law continues to be in flux, and in many jurisdictions includes a prohibition on *omitting* information necessary to make a statement *not* misleading when taken as a whole. *Id.*, *available at* http://www.abanet.org/cpr/ ethics2k.html (last visited Mar. 29, 2002). Both of these recommendations were adopted by the ABA House of Delegates at the mid-year meeting held in Philadelphia in February 2002.

In PRI's March 2001 submission to the Ethics 2000 Commission, however, it proposed a completely revamped Comment [2], challenging existing conventions of negotiation, and urging that lawyers take the lead in modeling new "rules of the game" that might have an uplifting effect on society generally:

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under *previously* accepted conventions in negotiation, certain types of statements were not taken as statements of material fact, *presupposing participants equal in sophistication and knowledge of the conventions of the market place, and of society's moral*

truthful answer counted as a prohibited "lie," then no negotiation session could last longer than one minute (and poker would cease to hold any interest for players above the age of six).

Instead, just as good poker players do *not* show their hole cards until the other players have paid to see it, good negotiators do *not* give up—let alone volunteer—information without receiving some information in exchange. They have developed a variety of techniques by which to *avoid* answering—*and thus also to avoid lying*. They meet a question with another, or (temporarily) change the subject, but their purpose is to create a *false* impression of exactly where they want the negotiation to come to closure.[54]

Another telling example arises from the classic debate over whether it ought to be permissible (or perhaps even mandatory) for a lawyer to cross-examine a witness who is known (to the lawyer) to be telling the truth. A lawyer who does so is obviously trying to lead the trier-of-fact to come to a *false* conclusion about a factual matter, yet *the lawyer* is not making *any* statements, let alone false statements. Is this practice, which is common in both criminal and civil matters, so obviously "lying" that a child of five would recognize it as such, or is it part of legitimate advocacy precisely because there is no lying at all, "only" misdirection?[55]

> *repugnance towards lying as a general proposition. Because these presuppositions are not always operative, the burden should be on the attorney to disclose when a statement is an opinion such as* estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim. Lawyers should be mindful of their obligations under applicable law to avoid misrepresentation, *including fraudulent and negligent misrepresentation.*

Letter from W. William Hodes, Esq., Reporter, The Professional Reform Initiative, to American Bar Association Ethics 2000 Commission (Mar. 12, 2001) (copy on file with the South Carolina Law Review).

54. *See, e.g.*, Martin Latz, *Truth, Strategy Can be Tough Elements to Mix*, BUS. J. OF PHOENIX, Jan. 4, 2002, at 28 (discussing how to "effectively block and avoid answering strategically critical questions and still be truthful"). Mr. Latz is an Adjunct Professor of Negotiation at Arizona State University College of Law, the negotiations columnist for *The Business Journal*, and the owner of the Latz Negotiation Institute.

55. This issue has been well-debated in the literature. See HAZARD & HODES, *supra* note 17, at § 40.3, which includes discussion of the best known exchange in the criminal law context. *See generally* John B. Mitchell, *Reasonable Doubts Are Where You Find Them: Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 GEO. J. LEGAL ETHICS 339, 343-46 (1987) (arguing that even when a defense attorney knows his client is guilty, he still may suggest to the jury areas where reasonable doubt may exist); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 149-52 (1987) (concluding that a criminal defense attorney who knows the truth of a fact established in the state's case should not attempt to contest that fact by impeachment, other evidence, or arguments); Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 629, 689-90 (1988) (conceding that even when defense attorneys know the prosecution's evidence is true, they may nonetheless test the weight of the evidence by offering alternative explanations of the fact).

How one answers that and similar questions[56] depends almost entirely upon whether one accepts or rejects the basic tenets of the American adversary system.[57] It is not surprising, therefore, to find that members of PRI have differing views on these most fundamental issues, even while they share a firm commitment to exposing and eliminating the lack of truthfulness among lawyers in the "down-the-middle" cases where virtually everyone would agree that "real lies" are at issue.

As the PRI continued developing its outreach materials, substantive disagreement about the problem of dishonesty by lawyers and how to deal with it turned on two other axes as well, in addition to the problem of defining what "counts" as a lie, as discussed above.

First, should PRI insist that the professional obligation must be to refrain from *all* lying, or should "zero tolerance for lying" apply only to such lying as is "material," or perhaps some intermediate standard, such as lying about "non-trivial" matters should apply? Second, should PRI recognize situational exceptions—such as exigent circumstances—to its proposed zero-tolerance policy? Or would these prove to be slippery slopes without a plausible toe-hold?

Existing rules governing lawyer conduct typically prohibit direct lies by lawyers, but the prohibition typically only applies to falsehoods that are "material." Prior to 2002, for example, Model Rule 3.3(a), for example, stated that a lawyer "shall not knowingly make a false statement of material fact or law to a tribunal,"[58] and Rule 4.1(a) extended the same ban for the benefit of third persons.[59] The clear implication of this language is that lying is permissible in both instances if the lie in question concerns something that is not material.

There has been persistent criticism that this way of stating the rule is too mild, and PRI was among the many groups and individuals supporting the Ethics 2000

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56. Consider, for example, the well-known Opinion CI-1164 of the Michigan State Bar Committee on Professional and Judicial Ethics, *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/ci-1164.html (last visited Mar. 29, 2002) and discussed at HAZARD & HODES, *supra* note 17, illus. 29-5, as well as in Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1145-47 (1988).

According to the Michigan Opinion, where the victim of a robbery was mistaken about the time of the crime, and the factually guilty defendant had a solid alibi for the wrong time, it was not unethical for defense counsel to present the *truthful* alibi, even though this might have the effect of leading the jury further from the ultimate truth, rather than closer to it. Mich. State Bar Comm. on Prof'l & Jud. Ethics, Op. CI-1164, *available at* http://www.michbar.org/opinions/ethics/numbered_opinion/ci-1164.html (last visited Mar. 29, 2002).

57. *Compare* Hodes, *Aim Better*, *supra* note 6, at 1033-34 ("So long as they do not rely on false or fabricated testimony, lawyers may 'spin' in closing argument whatever alternative theories of the case they choose.") *with* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern Multicultural World*, 38 WM. & MARY L. REV. 5, 38-39 (1996) (suggesting that we could "prohibit the cross... examination of witnesses 'known' to the lawyer to be telling th truth and prohibit the presentation of any evidence at all 'known' to be false by the attorney"), *and* John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and Public Trust in the Legal System*, 20 PACE L. REV. 93 (1999) ("The lawyer's skill is to weave stories that are false out of statements that are true.").

58. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2001).

59. *Id.* R. 4.1(a) (2001).

Commission when it recommended deleting the word from Rule 3.3(a) in its November 2000 Report to the ABA.[60] Interestingly, however, the Ethics 2000 Commission recommended *retaining* the materiality requirement in Rule 4.1(a) when someone other than a tribunal is being lied to,[61] *and PRI did not object* (although it is possible that this was an oversight due to the press of time).

This suggests that there is the additional difficulty that a definition of "materiality" in this context is not self-evident.[62] Moreover, even PRI, with its battle cry of "zero tolerance for lying," may have sensed that in the real world a total ban on *all* falsehood is unworkable, at least so far as drafting a binding rule of conduct is concerned.

Thus, when a lawyer is *not under the formal strictures of rules of court*, it perhaps ought to be left to social mores rather than professional ethics to decide what to do about lawyers who lie about whether they are available to take a phone call, whether an opposing client is having a bad hair day, or whether the Easter Bunny really exists. However, in court no lie is immaterial, and virtually none are trivial,[63] because even a lie about vacation plans or a copy machine malfunction can adversely affect the smooth functioning of the judicial system.

Finally, there is a subset of situations in which real lying is at hand, the lies are without doubt of real substance, but justifications are offered that have some plausibility. Typically, these situations involve unusual or exigent facts, and the proffered justification is that a lie is preferable, both legally and morally, to the available alternatives.[64] Moreover, these situations typically lead to heated (and

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60. ETHICS 2000 COMM. REPORT, *supra* note 53. In February 2002, the ABA House of Delegates adopted this recommendation.

61. *Id.* The ABA House of Delegates also adopted this recommendation in February 2002.

62. *Compare* Chauncey M. DePree, Jr. & Rebecca K. Jude, *The Materiality Precept in the Legal Profession's Rules of Conduct*, PROF. LAW., Nov. 1993, at 10 (arguing that there is potential for abuse in the application of Rule 3.3(a)(1) and supporting a recommendation that the rule be modified to read that "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal."), *with* W. William Hodes, *Two Cheers for Lying (About Immaterial Matters)*, PROF. LAW., May 1994, at 1. In the latter article, I agreed with the authors of the first article that lawyers should not be allowed to lie to courts about "material" matters, but disagreed that the examples they used to criticize existing Rule 3.3 involved anything less than material lies. *Id.* at 4.

More important, I argued that the confidentiality principle and both client and lawyer autonomy *ought* to trump the duty of candor to the court with respect to trivial matters that have no bearing on the issues before the court, and that the "materiality" concept could be retained in the rule language without harming the system. *Id.* at 6. I now see, however, that the word "material" carries too much baggage from the criminal law context and from the law of fraud and misrepresentation, and that the intended dividing line is better described by a word such as "nontrivial."

63. *See supra* note 62.

64. A favoritequestion of law professors and moral philosophers asks what should be the proper response if Nazi storm troopers demand to know if any Jews are hiding in the basement. *See, e.g., Professionalism Symposium, supra* note 1, at 536 (comments by Rob Atkinson, Professor of Law, Florida State University College of Law). When a lawyer is acting in a private capacity, the proper response is surely that a lie is *mandatory*, but the solution to this problem would be more difficult if the lawyer were somehow to be asked the question in a formal setting *within the American judicial system. See also Professionalism Symposium, supra* note 1, at 538-39 (comments by Jack Lee Sammons, Professor of Law, Mercer University Law School). Professor Sammons, in response to Professor

evenly matched) discussions among lawyers and scholars about what the rules say and ought to say—which is exactly why the PRI has temporarily banished them to the sidelines for purposes of its "down-the-middle" outreach efforts.

Most recent examples have involved possible application of rules such as Model Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation,"[65] rather than the rules discussed earlier that directly prohibit lying.[66] In one celebrated case, a maniac who had already killed several people with an axe told the police (via a mobile phone) that he would surrender if provided with a lawyer.[67] Otherwise, he would continue his killing spree.[68] A prosecuting attorney secured the man's surrender by pretending to be from the local public defender's office.[69]

In another case, the Oregon Supreme Court ruled that it was unethical for a lawyer to impersonate a doctor in order to gather evidence about possible fraud by

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Atkinson's example, stated:

> I may surprise [other participants] here because I think lawyers have a unique obligation towards honesty, one that is far more demanding than the honesty of ordinary morality. In other words, if Rob's Nazis were at the door of a lawyer and the conversations with them were part of the legal conversation, then Kant got the answer right. The reasons for this, however, are not Kant's reasons. The primary reason is that dishonesty is more destructive of the quality of the legal conversation than anything else, and the quality of that conversation is the primary good carried by our practice. In other words, honesty is a constitutive rule of our practice; we do not have a practice without it. When we are dishonest, we foul our own nest.

Id.

One practical response to this particular version of the problem of exigent circumstances is simply to put the debate aside as purely theoretical, and take comfort in the fact that real world reformers cannot encounter this difficulty in contemporary America. But see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975), for a haunting account of the struggle between dedicated nineteenth century abolitionists over the best way to deal with the federal Fugitive Slave Laws, which had repeatedly been upheld by the United States Supreme Court as constitutional. One group insisted that the only moral course was to seek to become appointed as commissioners under the laws and deliberately *flout* them, *refusing* to order the return of slaves to Southern states, even when there was no defense under the law. *Id.* at 184-85. Another group insisted that such lawlessness would hurt the abolitionist cause in the long run and that it would be better to work within the political system to achieve repeal of these hated laws. *Id.* at 175-78.

Although the moral dilemmas arising from either the "Jews in the basement" example or the problem of fugitive slaves cannot arise today, it must be noted that similar crises of conscience *can* arise for some lawyers in the specific context of right-to-life versus right-to-choose litigation. Although they are in a distinct minority, some lawyers equate contemporary Supreme Court jurisprudence flowing from *Roe v. Wade*, 410 U.S. 113 (1973) with the fugitive slave law cases that Professor Cover wrote about. For these lawyers, the legal system itself is morally bankrupt (in this limited area) and not entitled to command obedience to its doctrines in the ordinary way.

65. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2001).

66. *See supra* notes 58-59 and accompanying text.

67. People v. Pautler, 35 P.3d 571, 576 (Colo. 2001) (holding that a prosecuting attorney's knowing and intentional actions to deceive the maniac into believing that the attorney was a public defender violated *Colorado Rule of Professional Conduct* 8.4(c)).

68. *Id.*

69. *Id.* at 577.

a medical review company,[70] but then stunned the federal and local law enforcement community by going out of its way to confirm that this principle applied to ordinary undercover operations as well, if they were conducted with the assistance of licensed lawyers.[71] Similar arguments have been made, pro and con, in the case of discrimination "testers," who, with the help of their lawyers, pretend to want to engage in certain activities, such as buying a house, to see if they will be discriminated against.[72]

IV. CONCLUSION: THE PROFESSIONAL REFORM INITIATIVE BEGINS TO GAIN ACCEPTANCE AND MOMENTUM—RIGHT DOWN THE MIDDLE

As described earlier in this Article,[73] the PRI was initiated by a small group of reform-minded individuals within the NCBP, but did not win universal support within that group. To the contrary, some viewed with alarm NCBP programs that acknowledged that some of the public's criticisms of lawyers had validity. Moreover, there continue to be bar leaders whose preferred response to public criticism is to mount public education campaigns about the positive but often misunderstood role that lawyers play in society, or public relations campaigns about the good works that lawyers perform.

Gradually, however, the NCBP began to present programs that seriously treated the notion that lack of trustworthiness in lawyers is not merely a perceived problem, it is part reality as well. Early in 2000, PRI was formed under a grant from the Open Society Institute of the Soros Foundation, and began to develop an outreach program to state and local bar associations, members of the judiciary, and the law school community. In addition to presentation of more informational programs at NCBP annual and mid-year meetings, PRI also began to develop backup resources that could be turned over to constituent groups to aid in their reform efforts.[74]

Because of lingering doubts and concerns that some expressed about PRI's project, and because some peripheral issues were too complex (and perhaps too divisive) to be embraced by a group just finding its balance, a tactical compromise was reached to focus first on the situations in which there is more easily an

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70. *In re* Gatti, 8 P.3d 966, 973-74 (Or. 2000).

71. *Id.* at 979-80. The Oregon Supreme Court has now adopted a total revision of this part of its rules, which would specifically *allow* this type of deception, in both civil and criminal cases, if the lawyer has legitimate purposes for conducting these covert activities. *See Oregon Amends Disciplinary Rule to Clarify That Lawyers May Supervise Covert Activity*, 18 Law. Man. on Prof. Conduct (ABA/BNA) 94 (2002).

72. See, in the criminal law context, Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722 (1989). With respect to argument over the legitimacy of discrimination "testing," see David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the* Model Rules of Professional Conduct, 8 GEO. J. LEGAL ETHICS 791 (1995). As noted in note 71, *supra*, the Oregon Supreme Court recently approved amendments to the *Oregon Rules of Professional Conduct* that would permit good faith lawyer participation in such "testing" activities.

73. *See supra* Parts I, II.

74. *See supra* Part III.

agreement that lying is unacceptable, and only later to branch out to address the more subtle issues that sometimes arise in practice.

As PRI's second full year of operation came to a close at the end of 2001, it was able to report real success in breaking through the inertia that often greets a new venture. Audiences at NCBP meetings were less inclined to worry that openly talking about problems within the profession would further damage its image and more inclined to ask for information about how to begin their own reform efforts.

Well over a hundred bar leaders attended the last two PRI sessions held at NCBP meetings and took back to their bar associations copies of the resource book that PRI has gradually developed, and many more have received copies by mail. The video tape featuring excerpts from speeches by Chief Justice Thomas Zlaket and lawyer and social anthropologist Roberta Katz—still a work in progress—has been distributed to many bar leaders, and more copies will be made available when it is completed with the addition of academic voices and other material from contemporary films and television programs.[75] PRI members have made several presentations at local and regional bar meetings.

Most important, several bar associations have reported that they are or will be taking up PRI's first initiative as their own, emphasizing truthfulness and honesty as essential values of the legal profession. These include state bars in Alabama, Colorado, Illinois, Nebraska, and Montana, and local bars in Atlanta, Dallas, Fort Worth, and Long Beach, California.

The Colorado State Bar has moved faster and farther in that direction than other bars, and its efforts, including the establishment of a statewide Professional Reform Task Force, were highlighted at the PRI workshop at the NCBP mid-year meeting held in Philadelphia in February 2002.[76]

Slowly but surely, the PRI is beginning to have an impact on the way that American lawyers think about the reality of their relationship to truth and honesty. If they find that reality is not as attractive as it should be, then the next step must be to change current realities, so that truthfulness and honesty once again become the lawyers' stock-in-trade, the very basis of the core values defining what it means to be a lawyer. And when that reality begins to change, it goes without saying that public perception will follow closely behind.

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75. *See supra* notes 32, 50.

76. When 2001-2002 Colorado State Bar Association President Laird T. Milburn took office, he announced the formation of a Professional Reform Task Force, to be chaired by outgoing President Dale R. Harris. *See* Laird T. Milburn, *Professional Reform*, COLO. LAW., July 2001, at 51. During *his* presidency, in turn, the latter had expressed interest in the issues raised by PRI. *See* Dale R. Harris, *Do Lawyers Lie?*, COLO. LAW., Sept. 2000, at 19. Both of these articles are included in the resource book provided to state and local bar associations by PRI. *See* ENHANCING TRUST IN THE LEGAL PROFESSION, *supra* note 19, tab 3.

The Colorado Professional Reform Task Force includes some seventy-five members, drawn from all geographical areas of the state, and all practice areas. In addition to practicing lawyers, the Task Force includes trial and appellate judges, representatives from Colorado's two law schools, and members of the public. The Task Force subdivided itself into five smaller groups, one each to look into impediments to truthfulness and incentives to dishonesty (1) with respect to clients, (2) with respect to courts and other tribunals, (3) with respect to fellow lawyers, (4) with respect to the public at large, and (5) within the law school community. It is anticipated that the Task Force will issue its report to the Colorado Bar Association in the spring or early summer of 2002.