Little White Lies

By Shannon L. Briesacher

I am currently working on a case where the attorney in question is facing a possible disbarment for multiple instances of lying to his clients. The reason that I can say, affirmatively, that the attorney lied is because we have it all on tape. In this particular case, the attorney told his client that he had filed multiple lawsuits that were never filed. The attorney told his client that the attorney had moved the client's inheritance into an investment account when it really remained in the attorney's trust account for almost a year. After having promised to visit the incarcerated client in prison and failing to do so, the attorney cited a snow storm, a sick relative, an uncooperative prison counselor and another sick relative as the reasons for the attorney's failure to visit.

The case got me wondering: Can we distinguish these "little white lies" about snow storms and sick relatives from the bigger ones that can jeopardize our ability to practice law? Certainly in terms of the harm to the client, one is distinguishable from the other. But aren't they all misrepresentations prohibited by the Rules of Professional Conduct?

IN THE BEGINNING

I have to assume that the most common white lie told amongst attorneys is the old "I'm in a meeting" when you don't want to take a client's telephone call. It is one of those lies that probably seem innocuous, unless you are a criminal defense attorney and your client is calling you from jail. What about when the judge is ready to set your case for trial and you tell the judge that you are backed up with other pending trials? The truth of the matter is that you aren't prepared for a setting in the case and now those white lies have extended to misrepresentations made to a judge during a legal proceeding. Clients are quite frequently under the misguided impression that a court has continued a case several times, when in fact the attorneys have requested the continuances. Is failing to tell our client that we are the reason for the continuance another lie that we tell ourselves is harmless? What about those times when an attorney is participating in mediation and makes it sound as if the evidence is better than what the attorney is able to present? Is this zealous advocacy or a misrepresentation of the truth?

A DIFFICULT BALANCE

Lest anyone get the impression that these simple situations represent the whole of the judgment calls an attorney must make, let me recognize that there is sometimes inherent difficulty in determining when the absolute truth is the best course of action. One of the greatest challenges is balancing the duty to maintain client confidentiality, pursuant to Rule of Professional Conduct 4-1.6, with the duty to be candid and forthright before a tribunal.[1] An attorney is required to act in the best interest of his or her client. At the same time, where the client is clearly in the wrong, the complexities of determining whether it is okay to remain silent or whether *something* must be said, even if it's not the whole story or in the client's best interest, make absolute adherence to the truth an exercise in judgment. When an attorney makes a mistake, disclosure to the client may reap negative consequences for the attorney. Self-preservation kicks in and it likely seems easier to tell the client that the mistake was attributable to the court or deceptive practices by opposing counsel … anything but the truth of the mistake. When you take into consideration that we, as a culture, sometimes feel that it is better to tell a white lie than to hurt someone's feelings, it is easy to convince ourselves that these little white lies don't mean anything.

WHAT THE RULES SAY

Missouri Rule of Professional Conduct 4-4.1 provides that in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person. Though seemingly straightforward, Rule 4-4.1 would make it appear as if misrepresentations of truth made to the client, and not a third party, are allowed – or that acts of misrepresentation that occur outside the scope of representing a client are sanctioned. We know, however, that Rule 4-1.4 creates a duty in lawyers to keep clients reasonably informed about the status of the client's matter and to promptly comply with reasonable requests for information. Intrinsic in this Rule is a duty in lawyers to provide *accurate* information to the client. In addition, any misconceptions about Rule 4-4.1 are cleared up via Rule 4-8.4(c), which provides an overarching proclamation that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. This means that conduct involving dishonesty, whether towards a client, third party or a judge, is prohibited under the Rules. Further, it means that an attorney can

be sanctioned for dishonest conduct, even when it's outside the scope of his or her representation of a client.

In the case of *Matter of Cupples*, a Missouri attorney was disciplined for violation of Rule 4-8.4(c) when he secreted and removed files of his law firm's client prior to the attorney's withdrawal from the firm. While the acts of the attorney did not happen in the courtroom or even in reference to the underlying litigation, the court found that the attorney was wrong to have concealed the change in circumstance from the firm and client.[2]

In the case of *In re Disney*, a Missouri attorney was found to have violated Rule 4-8.4(c) for creating a trust to shield assets from his ex-wife and then asking a former client to lend him money while lying about the nature of the trust.[3] Again, the acts of dishonesty were not in the courtroom and not part of a piece of litigation with a current client. So if the Supreme Court of Missouri deems it necessary to sanction attorneys for dishonest conduct that occurs outside of the courtroom, it can only be concluded that misrepresentations that occur with respect to client representation inside the courtroom may be viewed as particularly egregious.

TAKE A LESSON

Several years ago, the Office of Chief Disciplinary Counsel received a complaint from a judge. During a pretrial conference in the judge's chambers, the judge inquired of an attorney as to whether the attorney's client had paid a fine to the court. The attorney, having no reason to believe that the client had paid the fine, affirmatively stated to the judge that the fine had been paid. When the judge learned that the fine had not been paid, the attorney claimed that she had made a simple mistake, but the judge filed a complaint with the Office of Chief Disciplinary Counsel. The attorney in question was ultimately disciplined for failing to exercise candor before a tribunal.

In the case of *In re Donaho*, the respondent attorney was in the middle of his own disciplinary investigation when the committee informed the attorney that timely restitution to the client would be regarded as a mitigating factor in the attorney's disciplinary case.[4] The attorney faxed the committee copies of two money orders that were made out in the name of the client with a handwritten notation that the money orders had been sent to the client by certified mail. *Id*. As such, the committee voted to issue an admonition and close the investigation. It turned out that the respondent attorney had not mailed the money orders and instead took them back to the place of purchase and obtained a refund of his money. *Id*. Thereafter, the committee filed a petition to initiate disciplinary proceedings and the attorney was sanctioned. *Id*.

In the case of *In re Ver Dught*, an attorney was suspended after counseling a client not to mention her remarriage during a Social Security proceeding and then referring to the client by her name prior to the remarriage during the hearing.[5]

It is seemingly easy to distinguish these cases, where the attorneys lied to their clients, the court and a disciplinary committee, from the day-to-day white lies that get told. But in disciplinary cases, the Supreme Court of Missouri conducts a sanction analysis pursuant to the American Bar Association's Standards for Imposing Lawyer Sanctions and the standard analysis does not vary much from one lie to the next.[6] The ABA Standards provide that absent aggravating or mitigating circumstances, disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another and causes serious or potentially serious injury to the client. *Id*. In contrast, a reprimand – which does not affect an attorney's ability to continue practicing – is generally appropriate when a lawyer negligently fails to provide another with accurate or complete information and causes injury or potential injury to the client. In other words, after making a misrepresentation of fact, the difference between being disbarred and receiving a reprimand may largely come down to a factfinder's determination of the attorney's *mens rea*. That fact determination is an awfully big gamble when talking about an attorney's livelihood – and one that could be avoided by treating all misrepresentations, no matter how big or small, as completely prohibited.

Not only can an attorney avoid disciplinary problems, but we frequently hear that an attorney's career is built on his or her reputation. When an attorney develops a reputation for honesty and fair dealing, it benefits the judges, who quickly learn that they can trust the aversions of the honest attorney. It benefits opposing counsel, who does not feel suspicious and therefore doesn't feel compelled to battle over each interaction that you have together. And the person who is most benefitted is the honest lawyer, who has a thriving practice built on good relationships with judges, clients and fellow attorneys.

ENDNOTES

1 Rule 4-3.3 provides a specific prohibition against knowingly making a false statement of fact or law to a judge.
2 *Matter of Cupples*, 952 S.W. 2d 226 (Mo. banc 2007)
3 *In re Disney*, 922 S.W.2d 12 (Mo. banc 1996)
4 *In re Donaho*, 98 S.W.3d 871 (Mo. banc 2003)
5 *In re Ver Dught*, 825 S.W.2d 847 (Mo. banc 1992)
6 *See*, *In re Coleman*, 295 S.W.3d 857, 869 (Mo. banc 2009) (wherein the Court states its reliance on the ABA Standards for guidance).

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