Introduction

It is important to be honest, but that does not mean it is easy. Consider the challenges of simply providing truthful testimony in court. Numerous discrete steps are involved, with opportunities for error at each stage.

- First, a witness needs to have been in a position to observe the relevant events, free from distraction or obstruction.
- In addition, the witness must have been able to observe the entire event, or at least its significant aspects, rather than some unrepresentative part.
- Moreover, the witness must reliably know — not merely assume — that she saw and heard everything of consequence.
- Even then, there is no guarantee that the witness perceived the events accurately — she may have seen things out of context or from an odd angle, or she may have misconstrued certain words and gestures.
- Next, of course, she has to understand everything she perceived, drawing accurate conclusions and avoiding inappropriate suppositions.
- When she finally she gets to court — perhaps months or years later — she has to remember the necessary facts, without gaps or elaboration.
- Even total recall is not enough, however, because she also has to articulate her memories with sufficient clarity and in coherent order.
- Then there is the question of emphasis — our witness must be able to stress the truly important details, without dwelling on trivia or meandering through meaningless details.

But even if our witness somehow manages to succeed in all that, there is no guarantee that the fact-finder will actually understand her. The judge or jury will also have to overcome comparable difficulties of perception,
perspective, comprehension, memory, and interpretation. And these may be skewed by extraneous factors (subtle or otherwise) such as bias, preconception, self-interest, self-doubt, self-delusion, fear, caution, sympathy, cynicism, mistrust, attraction, resentment, idealism, conjecture, and more.

Honesty is elusive for all of the players in the legal system — clients, lawyers, judges, teachers — even with the best intentions, because it is inherently difficult to recognize, communicate, and appreciate the truth. Other values, such as confidentiality, autonomy, and fairness, also play a role. Sometimes secrets must be kept and accurate information must be barred. Still, most lawyers do their best to be honest, dealing as much as possible only in truth, within the limits of self-awareness and procedural constraints.

No one pays much attention to honest lawyers, however, for the excellent reason that there is not much to say about them. To paraphrase Leo Tolstoy’s famous observation about happy families, all honest lawyers are alike. Or to put it somewhat differently, there is really only one way to be honest — whether we define honesty as truthfulness, candor, integrity, or something else ineffable — which ultimately makes the subject unremarkable, mostly routine if not quite mundane.

Without basic honesty, our entire judicial system — with its structure of rights, autonomy, due process, and the rule of law — would collapse because we could not rely on the good faith of the human beings who administer it. Honesty-deficient lawyers and judges — and, yes, law professors — can do enormous and unpredictable harm to both individuals and institutions because, again paraphrasing Tolstoy, every dishonest lawyer is dishonest in his or her own way.

And it is not only the out-and-out liars who spell trouble. There are nearly innumerable ways, either bold or subtle, in which lawyers can fall short: obfuscation, exaggeration, guile, concealment, misrepresentation, trickery, omission. It is intriguing simply to list these potential departures from pristine honesty, and there are many more, because — let’s face it — not all such conduct is prohibited by the legal profession, and sometimes it is even rewarded. In this context, honesty is an elusive aspiration — a platonic ideal — and its negative complement is not so much dishonesty as imperfection.

It is that conundrum, of course, which proves to be endlessly engaging. The legal professions turn out to have a complex and often discomfiting approach to honesty. To be sure, we prize its positive virtues, including
disclosure, transparency, and forthrightness. In contrast we condemn such subversive behaviors as lying, cheating, scamming, and fraud. That seems clear enough, but not everything in the world, much less in the courts, can be easily characterized as true or false. Most lawyers operate in the vast distance between those two absolutes, where facts are muddy, motivations are enigmatic, loyalties may be clouded, and duties are frequently vague or contradictory. It is there that we find not only the ever-present temptations to deceit, but also several inescapable impediments to absolute honesty that affect even the most sincere attorneys.

It is a given that faithful lawyers are required to keep clients’ confidences and pursue clients’ goals. Thus, law practice invariably involves a good deal of selective omission, skillful evasion, and, shall we say, the artful characterization of inconvenient facts. In addition, there are other factors that make it difficult — for lawyers, clients, judges, critics, and everyone else — to recognize or accept the truth. No one is immune to some small measure of hypocrisy, self-delusion, denial, or wishful thinking, all of which diminish our ability to appreciate — and therefore our ability to convey — the utter truth.

The essays in the following pages will explore the strained relationship between honesty and the major participants in the legal system, dividing the discussion into five parts: Clients, Lawyers, Judges, Professors, and a final section on the frequently posited analogy between law practice and medicine. The focus is primarily on poor behavior and questionable practices — not because they are more prevalent or important than elementary decency, but because they are more instructive. In every field, much knowledge is gained from negative examples: pathologists study illnesses to learn more about health; city planners observe traffic jams so that they may eliminate congestion; climatologists measure CO₂ emissions in order to preserve the environment. Thus, we can learn a great deal about improving the legal system by understanding where and how it goes wrong.

Clients

We begin where lawyers always begin, with the perpetually challenging complexities of clients, who, as the Greek philosopher Protagorus would have put it, are the measure of all things. It is not unusual to divide the universe of clients into the two general categories of innocent and guilty (or perhaps blameless or at fault in civil cases, or, more broadly, either decent
or unworthy), but that would be inaccurate. From a lawyer’s perspective, clients are best described as either reliable or unreliable.

Reliable clients are the best sort because they provide their attorneys with accurate and complete information, thus making possible effective representation. In that sense, reliability stands quite apart from whether a client is right or wrong on the merits. Bad people can be represented quite well, within the bounds of the law, so long as counsel has a realistic understanding of the situation. Good people, alas, hurt only themselves when they keep their lawyers in the dark.

In litigation, some clients simply lie to their lawyers in the misguided hope of selling a phony story to a credulous judge, jury, or adversary. In business transactions, unscrupulous clients entangle unsuspecting lawyers in their slick schemes by getting them to “paper” all manner of crooked deals, fraudulent stock offerings, fictional enterprises, or other imaginative swindles. These baneful characters, though dismayingly difficult to recognize, are bad news for their unfortunate attorneys — lost cases, unpaid fees, professional embarrassment, tort liability, disciplinary proceedings, and sometimes even indictment. Such clients are willfully unreliable, and the only true remedy is to avoid them at all cost.

But a client does not need to be treacherous in order to be unreliable. Because everyone is fallible, especially when it comes to memory and communication, many otherwise respectable clients may convey unreliable information. They may do so because they are intimidated, naïve, suspicious, ignorant, arrogant, or merely foolish, and while some of these motives and causations are more excusable than others (it is much easier to forgive fear than bravado), most can be overcome through close questioning and patient explanation of the lawyer’s role.

It doesn’t always work, but clients tend to become more reliable as their attorneys become more trustworthy.

Lawyers

Every lawyer must constantly contend with the conflicting demands of client loyalty and responsibilities to others, generally putting the client’s interests first. Clients may be selfish, inconsiderate, greedy, or mean, but it is nonetheless important to protect their rights and pursue their objectives. It is only a slight overstatement to say that respect for individual autonomy is the defining characteristic of constitutional government and a successful
free-market economy, and that lawyers are therefore the stewards of political liberty and social prosperity. Unfortunately, it does not always appear that way.

It is a sad reality that some lawyers abuse their clients’ trust or exploit their privileged position in the legal system. They lie or steal or assist in all sorts of nefarious deeds. When caught, they bring disrepute upon themselves and betray their profession. Every bad actor helps create the impression that most lawyers, if perhaps not all, are corrupt connivers dedicated solely to self-enrichment.

That is a hard image to shake because good attorneys do, in fact, doggedly seek to maximize outcomes for their clients, often at considerable cost to others. There are winners and losers in every litigated case, and often in settlements and commercial transactions as well. It is difficult for the public to understand that lawyers provide a widespread social benefit by single-mindedly representing individual interests, especially when the particular individuals are marginalized, unpopular, or disgraced. Unfortunately, many political commentators have seized upon this phenomenon as an excuse to discredit the entire profession, ignoring the diffuse benefits of the adversary system while vilifying the advocates who labor within it.

It is important to be honest about the role of counsel in a free society. Thus, this section of this book will address not only the failings of attorneys themselves, but also the ways in which the legal system has been regrettably, and dangerously, mischaracterized for political purposes.

Judges

Certain judges, needless to say, have their own set of problems with honesty, and I’m not just talking about graft and extortion. Relatively few judges ever take bribes or solicit kickbacks, although judicial miscreants naturally make headlines when they are caught. Fortunately, most lawyers, and litigants, will spend their lifetimes in the courts without ever directly encountering a corrupt judge.

Many more judges, however, fail badly at the task of honest self-appraisal. Entrusted with enormous authority over the rights and fortunes of their fellow citizens (and granted lifetime tenure, in the case of federal judges), they delude themselves into believing that they have special powers of perception and wisdom. Some few judges exhibit the well-known
“God complex,” demanding abject obeisance from all who appear before them (and pity the mortal lawyer who offers an affront). Others intermittently demonstrate less serious episodes of “black robe fever,” becoming overbearing, short tempered, or arbitrary. And even the best judges have their occasional lapses — ignoring rules of conduct, flouting public expectations, dismissing legitimate concerns — usually because they are unable to recognize in themselves the faults they would censure in others.

These dispositions can be deeply corrosive, verging on the sort of intellectual dishonesty that ultimately tends to undermine the judicial process — “I know it’s the right decision, because I’m the one who is making it!” More frequently, the problem amounts only to what we might call “introspection deficit disorder,” which is still unpleasant when encountered but not nearly as destructive as absolutism and grandiosity.

It is ironic that so many judges — whose jobs ideally call for reflection, discernment, patience, and, as Chief Justice John Roberts explained at his confirmation hearing, humility — so often fall prey to the vices of egoism, obduracy, arrogance, and (it has to be said) narcissism. Perhaps some preternatural measure of prideful confidence comes in handy, and may even be necessary from time to time, if one is to deliver decisive judgments. In any event, it is no small feat, particularly among the anointed and august, to “see ourselves as others see us.” It is therefore understandable, though far from optimal, that judges can be less thansearchingly candid when they assess their own behavior or evaluate their own performance.

Academics

Judges and lawyers all began their careers as law students, eager to pursue an onerous course of study and ready for their instructors to initiate them in the intricacies of their chosen profession. At least during the first few semesters, law students look up to their teachers, expecting them to be not only knowledgeable about the black-letter law, but also candid about their own viewpoints and interpretations. A good teacher openly flags his or her opinions and does not try to pass them off as revealed truth. In a world where arguments are evaluated largely on their formal “strength” rather than according to some measure of elemental validity, a diligent law professor can inject a much-needed counterweight of intellectual rigor, and perhaps even objectivity. Many professors are in fact idealists, committed to open-minded inquiry and determined to teach their charges to
be thoughtful and tolerant, but the academy also has its fair share (if not more) of cynicism and hypocrisy.

The failings of law professors are often manifested by sharp inconsistencies between what they say and what they do. It is not hard to identify professors who are dedicated to “cutting-edge” research, although increasingly detached from the real world; theoretically broad-minded, but actually narrow and doctrinaire; stern and demanding when it comes to students’ assignments, while enjoying the leisure of a minimal teaching load; ostensibly devoted to “neutral principles” that (just coincidentally, mind you) always lead to conveniently partisan results.

Law professors seem to resemble judges in the general nature of their faults — much self-regard and little self-doubt — but there is a significant difference. Judges make meaningful, and sometimes momentous, decisions about people’s lives. The impact of teaching and scholarship, with few exceptions, is far less dramatic and much less immediate. After all, what difference does a student’s grade make, or the publication of a law review article, compared to a hefty money judgment or a prison sentence? You might therefore expect academics to be rather modest about their enterprise and qualified in their conclusions, but that is not always so. Instead, we find teachers in every field who are dogmatic in their beliefs, rigid in defense of the academic (if not social) status quo, defensive of their perquisites, devoted to hidden agendas, and impatient with outsiders.

Then again, universities have always been a soft target for critics, easily portrayed as the province of absent-minded, fuzzy-thinking, self-indulgent eggheads. Beyond the campus, does anyone even use the word “intellectual” without some slight hint of mockery? Henry Kissenger never really observed that “academic politics are vicious because the issues are so petty,” but the caricature is attractive and the imagery is indelible. Every institution can benefit from a little ridicule now and then, but let’s be fair. Professors are sincerely committed, by and large, to free expression and the unlimited exchange of ideas. Such lofty ideals are far easier to profess than they are to achieve, so it is foreseeable that we will often stumble.

Medical Practice

There was a time in American life, not so long ago, when lawyers and doctors formed a fairly small and relatively cohesive professional elite — living in the same neighborhoods, belonging to the same clubs and civic
organizations, and generally holding each other in good regard. That was before the advent of managed care, the explosion in the sheer number of lawyers, the expansion of state and federal regulatory regimes, the rise of consumer advocacy, the demise of “professional courtesy,” the proliferation of tawdry prime-time soap operas, and many similar social and political developments. In the old days, doctors and lawyers believed that they shared, or mutually appreciated, a core set of professional values. Lately, not so much.

Today, doctors and lawyers often seem to be at war. Many physicians complain that they are under assault by a legal system run amok — victimized by ridiculous standards of malpractice liability, penalized by runaway juries, coerced into unfair settlements, and driven to debt by exorbitant insurance premiums. For all of that, and more, they are resentful of judges and angry at lawyers.

In response, lawyers tend to be, frankly, jealous. Doctors, for all their travails, have managed to maintain great public respect. They are widely admired for their altruism, dedication, education, competence, and (despite the occasional scandal) integrity. Lawyers, on the other hand, have become the objects of derision and the subjects of low humor. Even lawyers tell lawyer jokes, whose punch lines inevitably play on some variation of deceit, cupidity, or richly deserved popular scorn.

When doctors are idealized as saintly healers, while attorneys are stereotyped as ethically challenged con artists, it is predictable that many lawyers and lawyer-commentators will look to physicians as models for a better practice paradigm. Perhaps the legal profession could redeem itself — maybe even regain some public trust — if only lawyers behaved more like doctors.

As attractive and hopeful as it may be, the analogy between law practice and medicine is plainly inaccurate. Lawyers proceed from an ethic of autonomy and are required to advocate a client’s self-determined goals (so long as they are evidently lawful). Physicians, on the other hand, proceed from an ethic of care (sometimes called benevolence or even paternalism), in which they may administer or withhold treatments according to considerations that may go beyond a patient’s immediate requests.

It is that very dissimilarity, however, that makes it useful to compare the practices of law and medicine, with each as a foil for the other. This is particularly the case concerning such honesty-freighted issues as candor, disclosure, and confidentiality, where the norms of attorneys and physicians call for sharply different approaches. Indeed, the comparison of the
two professions — single-minded champions of individual rights versus tempered guardians of public health — can help explain just why lawyers do what they do. Surprisingly, lawyers’ ethics (the formal rules, that is, if not the daily instantiations) may sometimes provide important lessons for physicians, especially when it comes to practical matters such as conflicts of interest and informed consent.