

Truth

by Keith A. Call

Do you know what a “deepfake” is? If not, you need to learn.

Deepfake is a type of artificial intelligence that can be used to make images, audio, and video of fake events. Technology has developed to a point where an individual’s appearance, voice, movements, and mannerisms can all be convincingly replicated by computer, making it very difficult to separate truth from fiction.

Deepfakes can be whimsical and fun, but they can also be dangerous. For example, according to the Wall Street Journal, in 2022 Russia released a deepfake of Ukrainian President Volodymyr Zelensky calling on Ukrainians to surrender. Daniel Byman et al., *The Deepfake Dangers Ahead*, WALL STREET JOURNAL (Feb. 23, 2023, 9:58 AM), <https://www.wsj.com/articles/the-deepfake-dangers-ahead-b08e4ecf>.

This freaks me out, especially when I contemplate the 2024 campaign and election season. It feels certain that we will see deepfakes of our presidential candidates created by people who would love to see our democracy fail. Such deepfakes will be double trouble because “[a] climate of pervasive suspicion will allow politicians and their supporters to dismiss anything negative that is reported about them as fake or exaggerated.” *Id.* In other words, we will hear people argue that deepfakes (or is it really real?) are fake. I get dizzy thinking about the puzzling problem of identifying elusive truth.

This has caused me to further ponder the role of lawyers in discovering and advocating truth. Without meaning to diminish the critical role of mothers, fathers, and soldiers in any way, it may be that the ultimate success or failure of our democracy rests on the shoulders of lawyers. Perhaps I’m overthinking my own importance, but that is the kind of sanctity we should attach to our profession every day when we go to work.

It feels weird to affirmatively say it, but lawyers, especially we litigators, have a strange relationship with the truth. I can already see those words in an opposing brief, but it’s true for all

litigators. We don’t typically advocate for sterile “truth,” because who is to say what the truth is? We advocate for our clients, trusting in the adversary system – especially juries and judges – to separate truth from fiction.

Consider this:

Lawyers must be honest, but they don’t have to be truthful. Honesty and truthfulness are not the same thing. Being honest means not telling lies. Being truthful means actively making known all the full truth of a matter. Lawyers must be honest, but they do not have to be truthful.

Dennis A. Rendleman, *“Truthiness” and Professional Responsibility*, A.B.A.: ETHICS IN VIEW (Dec. 2019) (citation omitted), <https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/truthiness-and-professional-responsibility/?login>.

Try explaining that to a child. Or to any non-lawyer.

Is it okay for lawyers to wash their hands of “truth” in the name of honest advocacy? Do lawyers have some obligation beyond blind advocacy of unexamined “facts”? I’d love to hear your thoughts on this. Send them to me at kcall@scmlaw.com.

I won’t solve this riddle in 1,000 words, but I can review some of the key ethical rules on the topic. As you review these rules, try to think of a recent situation where you could have done a

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little better, or where you could still make a correction.

Utah Rule of Professional Conduct 3.3 addresses “Candor Toward the Tribunal.” Under this rule, it is unethical to “make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” It is also unethical to “fail to disclose to the tribunal legal authority in the controlling jurisdiction directly adverse to the position of the client and not disclosed by opposing counsel.”

Rule 4.1 is similar, but broader. It addresses “Truthfulness in Statements to Others.” It is unethical for a lawyer to “[m]ake a false statement of material fact or law to a third person.” It is also unethical to “[f]ail to disclose a material fact, when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless [the] disclosure is prohibited by Rule 1.6.”

Rule 7.1 is supposed to temper “Communications Concerning a Lawyer’s Services.” It reads:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s

services. A communication is false or misleading if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (2) is likely to create an unjustified or unreasonable expectation about results the lawyer can achieve or has achieved; or
- (3) contains a testimonial or endorsement that violates any portion of this Rule.

There are many other rules that explicitly or implicitly include concepts of honesty, such as Rule 1.15 (“Safekeeping Property”), 8.1 (“Bar Admission and Disciplinary Matters”), 8.2(a) (statements about judicial officials), and 8.4(c) (it is professional misconduct to engage in dishonest conduct or misrepresentation).

I am still in the middle of the difficult journey of figuring out how to be both a good lawyer and a good person. But I remain convinced that it *must* be possible and must be sought after, even for the sake of democracy. I am inspired by the example and the following words of Abraham Lincoln, as quoted in Rendleman, *supra*:

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young [person] choosing the law for a calling for a moment yield to the popular belief – resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

Let us all consider what our role is in defining and defending truth, and resolve to do better, whatever that means for each of us.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.