Nebraska Law Review

Volume 89 | Issue 2 Article 1

11-2010

To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA *Model Rules of Professional Conduct*

Tory L. Lucas
University of Nebraska at Lincoln, tllucas3@liberty.edu

Tory L. Lucas*

To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA *Model Rules of Professional Conduct*

TABLE OF CONTENTS

* Tory L. Lucas is a Visiting Assistant Professor at the University of Nebraska College of Law. Professor Lucas earned his B.A. degree, *magna cum laude*, from Culver-Stockton College, his J.D. degree, *summa cum laude*, from Creighton University School of Law, and his LL.M. degree from the University of Missouri–Kansas City School of Law, where he was the Arthur Mag Fellow of Law. Professor Lucas appreciates the outstanding contributions to this Article by his research assistant, Stephanie N. Mahlin, who earned her J.D. degree from the University of Nebraska College of Law in May 2010.

I. INTRODUCTION

> "In undertaking the privilege to practice law, I do solemnly swear that I will lie, deceive, misrepresent, and engage in fraud in order to serve my client's and my own personal interests."

Although I doubt that anyone reading this Article has sworn such an oath (or openly advocates the use of such an oath for newly sworn attorneys), the issue of whether attorneys may ethically engage in deception has not enjoyed the thorough, open discussion necessary for a consistently applied standard. This must change. Nearly a century ago, Louis D. Brandeis wrote that publicity can remedy social diseases, because sunlight is the best disinfectant and can effectively police human behavior.[1] A half-century before that, Lord Acton stated, "Every thing secret degenerates, even the administration of justice."[2] The legal profession, as guardian of the administration of justice, needs some disinfecting sunlight to pour over the attorney deception issue, one that for too long has vexed and perplexed attorneys and judges. As a profession, attorneys need a full and open debate to determine whether, and to what extent, it is ethical for attorneys to employ deception.

This Article concludes that the American Bar Association (ABA) *Model Rules of Professional Conduct* (*Model Rules*) currently do not contain a deception exception, and that without such an exception, attorneys employing deceptive practices are subject to charges of unethical misconduct. There are circumstances, however, that reveal how society can benefit through the use of deception. For example, longstanding policies of federal and state governments employ deception in undercover criminal investigations, various civil-rights groups employ deception to root out and eradicate discrimination, and holders of

1. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).
2. United States v. Salemme, 91 F. Supp. 2d 141, 148 (D. Mass. 1999) (quoting JOHN EMERICH EDWARD DALBERG ACTON, LORD ACTON AND HIS CIRCLE 166 (Abbot Gasquet ed., Burt Franklin 1968) (1906)).

intellectual property rights employ deception to ensure that others do not unlawfully infringe upon those rights. Although arguably a certain amount of deception is required to support these investigative efforts (because those suspected of unlawful activity are unlikely to continue their lawlessness if an investigator reveals his true purpose), there is no sound public policy that requires attorneys to personally engage in the deception. That does not mean, however, that, in the absence of positive law to the contrary, non-attorneys should be prohibited by attorney ethics rules from employing deception simply because an attorney directs the deception. This Article promotes a well-defined investigation exception to the prohibition of attorney deception, or what I term "the investigative deception exception."

Part II of this Article describes a recent news-making case involving attorney deception to set the stage for a discussion of whether attorneys may ethically engage in deception. Part III creates an analytical framework using the *Model Rules* to guide the discussion of disciplinary cases involving attorney deception. In Part IV this Article analyzes key disciplinary cases and ethics opinions implicating attorney deception. This Article then illustrates in Part V how some states have enacted express deception exceptions to their ethics rules. Finally, in Part VI this Article proposes an express investigation deception exception to the *Model Rules*. As the legal profession determines the scope of the deception exception, however, attorneys must stridently ensure that any unintended byproducts do not include the creation of distrust in the legal profession or the system of justice. Regardless of whether you ultimately agree with this Article's proposed investigation deception exception, attorneys owe each other, the legal profession, the administration of justice, and the citizens that rely on our efforts, a full and open debate on the ethics of attorney deception. Let's get to it.

II. AN ATTORNEY DID WHAT? USING ATTORNEY DECEPTION TO CATCH A CRIMINAL

Attorney deception can take—and has taken—many forms, including lying to non-clients, clients, and even courts. For obvious reasons, attorneys who engage in deception seek to be cloaked in anonymity to reap the benefits of their deception; being fair and forthright may not yield the same benefits as being cloaked in anonymity. As such, attorneys who engage in deception—or instruct others to engage in deception—often claim that deception is required to meet the needs of justice. This yields a couple of straight-forward questions. Are there circumstances in which attorneys may ethically engage in deception? If those circumstances exist, and if there should be a deception exception, what should be its scope? To fairly answer these questions, we must ask whether the legal profession, under the policing and cleans-

ing glare of sunlight through open debate, can rationalize that the ends sought to be achieved justify the means of attorney deception.

Although this Article will discuss numerous situations in which attorneys have used deception, it might be prudent to begin by describing the publicly available facts of an interesting—yet controversial—case in which a Nebraska attorney recently made headlines by participating in an undercover investigation to catch a criminal. Assisting both federal and state authorities, apparently under the direction and supervision of government attorneys, a criminal-defense attorney chose to wear a wire to record jailhouse conversations with a suspect.[3] From the public record, it is difficult to determine whether the attorney was acting as though he was the suspect's attorney, was being paid by the suspect to represent a co-defendant, or simply was acting as a criminal co-conspirator in a non-representational, non-attorney capacity. Regardless of the actual role assumed by the attorney, it is undisputed that the attorney intentionally employed deception to help authorities gather evidence against the suspect. The attorney undoubtedly hid his true identity and purpose as an undercover government informant from the suspect—otherwise the suspect may not have provided any damaging information.[4] Given the facts outlined below, the legal profession must ask whether attorneys have the unilateral right to decide to engage in this type of deception without running afoul of ethical standards. Society is listening for the answer.

A. Fact Pattern of the Recent Nebraska Case of Attorney Deception

By most publicly available accounts, Shannon Williams seems to be regarded as a dangerous man and a criminal. Williams has been charged with committing serious crimes, such as murdering a rival gang member (of which he was acquitted), distributing crack cocaine, and possessing marijuana.[5] More recently, federal authorities began to suspect that Williams was the mastermind and architect of a multi-million-dollar marijuana ring that trafficked more than a ton of marijuana between Phoenix, Arizona, and Omaha, Nebraska.[6]

The investigation into Williams's marijuana trafficking activities began with an October 5, 2008, traffic stop in Illinois of a speeding

3. Todd Cooper, *Lawyer Goes into Hiding*, OMAHA WORLD-HERALD, Jan. 10, 2010, at 01A, *available at* http://www.omaha.com/article/20100110/NEWS01/701109912 [hereinafter Cooper, *Lawyer Goes into Hiding*].

4. Cooper*, Lawyer Goes into Hiding*, *supra* note 3.

5. *Id.*; Todd Cooper, *Convict Ran Pot Ring from Jail*, OMAHA WORLD-HERALD, Dec. 19, 2009, at 01A, *available at* http://www.omaha.com/article/20091219/NEWS01/712199834/0/frontpage [hereinafter Cooper, *Pot Ring*].

6. Cooper, *Pot Ring*, supra note 5.

truck carrying 329 pounds of marijuana.[7] After the stop, the driver of the truck, Steve Kisseberth, and passenger, Richard Conway, agreed to cooperate with authorities.[8] They allowed the authorities to follow the truck to Omaha.[9] Later that day in Omaha, authorities arrested a woman who appeared to be acting as a lookout for the truck carrying the marijuana.[10] That woman was 23-year-old Nyasha Muchegwa, an immigrant from Zimbabwe who advertised herself on the internet as an "escort."[11] Marijuana conspiracy charges were filed against Kisseberth, Conway, and Muchegwa.[12] Through Kisseberth's and Conway's cooperation, investigators learned that these men, as part of a larger group directed by Williams, had been running 300 to 400 pounds of marijuana between Phoenix and Omaha for over a year.[13] After obtaining this information, the authorities launched a multistate investigation into the large-scale marijuana operation.[14]

At some point, investigators learned that Williams paid $8,000 to Terry L. Haddock, an Omaha attorney, to represent Conway in the matter.[15] Haddock, though, grew concerned about Williams's violent criminal activity. For example, Haddock told people that during his initial discussions with Williams about defending Conway on the marijuana charges, Williams talked about "eliminating" witnesses.[16] Although the status of the relationship between Haddock, Williams, and Conway is not entirely clear, Haddock was linked to them in some capacity. Haddock was also linked to Muchegwa. Before her October 5 arrest on marijuana conspiracy charges, Haddock had acted as Muchegwa's defense attorney on various criminal charges.[17] To make matters more complicated, Muchegwa testified during a deposition, which was taken in connection with a crime that she witnessed, that her relationship with Haddock was personal, perhaps romantic, before Haddock agreed to act as her attorney.[18] On October 6, 2008, a day after the traffic stop of the truck hauling marijuana and Muchegwa's arrest, Haddock began representing Muchegwa on the marijuana

7. Cooper, *Lawyer Goes into Hiding*, *supra* note 3.

8. Todd Cooper, *Suspected Drug Lord Duped*, OMAHA WORLD-HERALD, Jan. 3, 2010, at 01A, *available at* http://www.omaha.com/article/20100103/NEWS01/701039903 [hereinafter Cooper, *Drug Lord Duped*].

9. Cooper, *Lawyer Goes into Hiding*, *supra* note 3.

10. *Id.*

11. *Id.*

12. *Id.*

13. Cooper, *Drug Lord Duped*, *supra* note 8.

14. *Id.*

15. *Id.*

16. Cooper, *Lawyer Goes into Hiding*, *supra* note 3.

17. *Id.*

18. *Id.*

charges.[19] Federal prosecutors dismissed the marijuana charges against Muchegwa two weeks later.[20]

In January 2009, Williams was arrested for indecent exposure in Peoria, Arizona.[21] The arrest resulted in a search of Williams's house, during which 297 pounds of marijuana was recovered.[22] Williams then provided a false name to the police, posted an $800 bond, and fled the state.[23] Williams was not free for long. Police Officer John Stuck of the Bellevue (Nebraska) Police Department later arrested Williams in Minnesota for violating his supervised release from a 1993 crack-dealing conviction in Douglas County, Nebraska.[24] Officer Stuck obtained Williams's cellular telephone number from Haddock, and traced the number to Minnesota.[25] Williams was eventually delivered to the custody of the Douglas County Correctional Center.[26]

Although Williams was now in custody at the Correctional Center in Nebraska, authorities investigating the marijuana ring wanted more information about Williams's activities, his co-conspirators, and the extent of the drug operation. In the summer of 2009, Officer Stuck asked Haddock if he would act as a secret government informant by meeting with Williams at the Correctional Center while secretly tape-recording the conversations.[27] As an attorney, Haddock was allowed to meet face-to-face with Williams without jailers being allowed to listen to the conversations, an arrangement which might lead Williams to reveal incriminating information.[28] Haddock agreed to act as an undercover government informant and tape his conversations with Williams.[29]

19. *Id.*

20. *Id.*

21. Cooper, *Pot Ring, supra* note 5.

22. Cooper, *Drug Lord Duped, supra* note 8.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* Generally, only attorneys and members of the clergy are allowed to meet face-to-face with inmates at the Correctional Center. Jason Kuiper, *Jail Security Procedures May Change*, OMAHA WORLD-HERALD, Jan. 19, 2010, at 02B, *available at* http://www.omaha.com/article/20100119/NEWS01/701199930. To meet with an inmate, attorneys are required to show a valid bar membership card and leave their belongings in a locker. *Id.*

29. Cooper, *Drug Lord Duped*, *supra* note 8. Interestingly, the local Omaha newspaper reported that the United States Attorney for Nebraska "declined to explain authorities' decision to use an attorney to glean information from [the] alleged marijuana kingpin." Todd Cooper, *Crime Plotting May Be Beyond Scope of Policy*, OMAHA WORLD-HERALD, Jan. 3, 2010, at 01A, *available at* http://www.omaha.com/article/20100103/NEWS01/ 701039913/0/frontpage.

While secretly recording the jailhouse discussions, Haddock met with Williams more than thirty times over a six-month period.[30] Williams apparently trusted Haddock and spoke freely with him, resulting in authorities obtaining a wealth of information about Williams's ongoing criminal activities. During their face-to-face meetings, Haddock even provided Williams with a cellular telephone, which Williams allegedly used to run the multimillion-dollar marijuana ring from inside the Correctional Center.[31] Williams also asked Haddock to launder money and to pay someone to beat up Williams's longtime defense attorney.[32] Each time Williams requested Haddock to act, Haddock promised to comply with Williams's orders.[33] Although Haddock only pretended to comply with Williams's orders and did not follow through with them, Williams believed that Haddock was doing what Williams requested.[34] As a result of the investigation, and owing in large part to the information gained from Haddock's deception, the federal government indicted Williams and ten others on marijuana and money-laundering charges in December 2009.[35]

The existence of an attorney–client relationship between Williams and Haddock is likely to be a central issue in this case. Officer Stuck has since testified that in the first meeting between Haddock and Williams, Haddock "explained that he [was] not [Williams's] attorney and would not do any legal work for him at all."[36] Haddock claims that he agreed to wear the wire to record conversations with Williams because Williams threatened federal witnesses.[37] Williams, on the other hand, has stated that he had hired Haddock as his attorney to help with a lawsuit over the sentencing disparities for dealing powdered cocaine versus crack cocaine.[38] In response to a government motion to seal information related to the deal that secured Haddock's cooperation, Williams's defense attorney issued the following statement:

> We believe the government has engaged in outrageous misconduct here. The best way, the only way, [to respond to the motion to seal information related to the deal] is to require the government to put all their cards on the

30. Cooper, *Drug Lord Duped*, *supra* note 8.
31. *Id.*
32. *Id.*
33. *Id.*
34. *See id.*
35. Kuiper, *supra* note 28; Todd Cooper, *Williams Wants Charges Dropped*, OMAHA WORLD-HERALD, Jan. 5, 2010, at 01B, *available at* http://www.omaha.com/article/20100105/NEWS01/100109898/0/LIVING01 [hereinafter Cooper, *Wants Charges Dropped*].
36. Cooper, *Drug Lord Duped*, *supra* note 8.
37. Todd Cooper, *Attorney's Wire Motive Challenged*, OMAHA WORLD-HERALD, May 24, 2010, at 01A, *available at* http://www.omaha.com/article/20100524/NEWS97/100529815 [hereinafter Cooper, *Wire Motive Challenged*].
38. Cooper, *Drug Lord Duped*, *supra* note 8; *see* Cooper, *Wire Motive Challenged*, *supra* note 37; Cooper, *Wants Charges Dropped*, *supra* note 35.

table—to expose to the public all of the goings on so the court can properly judge it.[39]

B. Are Attorneys Ethically Permitted to Engage in Deception?

What do you think? After reading the fact pattern (assuming public reports are accurate), do you have a firm understanding of whether Haddock—or the government attorneys directing him—engaged in ethical deception as part of the federal and state investigations of Williams's suspected criminal activities? What analytical framework did you apply to these facts to reach a reasoned legal conclusion? Even if you are unable to coherently apply an analytical framework and set of legal standards to these facts, do you have a guttural instinct on whether Haddock acted ethically as an attorney by employing deception to help bring down Williams? Do you believe that there would be consensus among the bench and bar on whether Haddock engaged in ethical behavior?[40]

39. Cooper, *Wire Motive Challenged*, *supra* note 37. The Haddock case is not the first time that law enforcement officials have used an attorney to employ deception within the apparent attorney–client relationship to gather information against the client. In Ohio, law enforcement officials discovered that an attorney named Francis Pignatelli had been assisting his drug-dealing clients in laundering drug money and convinced him to serve as an undercover government informant against his clients. Phil Trexler, *Leniency Is Rejected for Lawyer: Summit Sheriff, Agents Speak on His Behalf*, AKRON BEACON J., Dec. 19, 2009, at B1, *available at* 2009 WLNR 25717084. Through his undercover informant work, Pignatelli delivered "more than $3 million in cash and pounds of drugs" while "sealing the convictions of the area's most notorious drug dealers," who were Pignatelli's clients. *Id.* Pignatelli voluntarily surrendered his license to practice law in Ohio. *Id.*; *see* Phil Trexler, *Attorney Enters Guilty Plea: Federal Informant Will Be Sentenced on Single Conspiracy Drug Charge*, AKRON BEACON J., Sept. 26, 2009, at B1, *available at* 2009 WLNR 19166570; *see also* People v. Pignatelli, No. 09PDJ007, 2009 WL 4018513 (Colo. Nov. 13, 2009) (disbarring Pignatelli from the practice of law for lying on his bar application about the criminal proceedings in Ohio).

40. As an anecdotal story, I talked with various attorneys and law professors about the Haddock case as I contemplated writing this Article. One could say that I conducted a rudimentary, unscientific poll of intelligent and experienced attorneys to get a sense of how attorneys might respond to the issue of attorney deception. The results of that poll suggest that there is not a quick and apparent answer to whether attorneys may ethically engage in deception. One prominent attorney thunderously responded that it was "obvious" that Haddock was ethically permitted to act as a covert government informant to help gain critical information about the dangerous Williams. This response fell along the lines of the ends-justify-the-means rationale. Two nights later, another prominent attorney vociferously exclaimed that it was "obvious" that Haddock had violated numerous ethical duties that are "fundamental and basic" to the practice of law. This response pointed to an ideological belief that attorneys should not be—or be perceived to be—liars. A couple of attorneys cautiously conceded that although they did not really know whether Haddock had violated any ethics rules, they admit-

The issue of attorney deception should be exposed to the light of day and enjoy a vigorous and open debate so that all attorneys know the bounds of ethical behavior. As will be described below, the outcomes of various attorney misconduct cases demonstrate a lack of consensus on whether and when attorneys may ethically engage in deception. This appears true even in cases where the ends seem to justify the means—when the lesser of two evils seems to justify the use of attorney deception.[41] But case-by-case determinations on the permissibility of attorney deception threaten to slide along a slippery slope, leading to public mistrust of attorneys, attorney confusion regarding ethical expectations, and, ultimately, either unenforceable or under-enforced ethical standards. Indeed, if each attorney is free to unilaterally carve out exceptions to deception prohibitions, then ethics rules cease to function as rules; they become mere guidelines. To safeguard the integrity of the legal profession and protect attorneys, there must be sound, clear, enforceable ethical standards that effectively govern the conduct of attorneys who may ponder employing deception. I propose an express, but limited, investigation deception exception that would make it ethical for attorneys to direct investigators who lawfully use deception to root out suspected unconstitutional or unlawful activity.

III. INTRODUCTION TO THE ANALYTICAL FRAMEWORK: A STROLL THROUGH THE *MODEL RULES*

It is important to create an analytical framework that will guide the analysis of whether attorneys may ethically engage in deception, no matter how one chooses to interpret or apply the ethical standards within that framework. The most logical approach is to focus on the *Model Rules*. Although some states' regulatory schemes vary somewhat from the *Model Rules*, those variations usually do not implicate the basic analytical framework that governs the issue of attorney deception.[42] Because a few states have attempted to explicitly regulate attorney deception, those variations will be discussed in due course in Part V.

When addressing attorney deception, it should be openly stipulated that attorneys do not simply serve their own desires or even the

ted that Haddock's conduct "did not smell right." Finally, one attorney wondered aloud whether this type of attorney deception would force criminal defendants to be cautious when hiring or sharing information with an attorney.

41. The fault in an implied ends-justify-the-means exception lies in the inherent difficulty of accurately determining in any given situation what ends and what means are at stake, such that logic can then dictate if an attorney may ethically employ deception under the circumstances.

42. To remain consistent throughout the Article, I refer to the *Model Rules* and not to each state's specific designation for their particular ethics rules.

desires of a single client. Although attorneys obviously represent clients, attorneys also serve as officers of the court to protect our legal system by standing as bulwarks of justice.[43] Attorneys must remain vigilant in conducting themselves to ensure that the public trusts our justice system and the rule of law.[44] Because "legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority" and trustworthiness, attorneys must work to improve the public's perception of the legal profession.[45] One unique and empowering way of accomplishing this laudable goal is to actively self-regulate attorney conduct to better serve the public interest. As a general rule, attorneys must act ethically at all times. Nevertheless, the goal of requiring attorneys to act ethically is only a starting point and not an ultimate proclamation—what is obviously ethical to one person may be obviously unethical to another.

By self-regulating conduct within the legal profession, attorneys stand in a unique position in society by ensuring the fair operation of an entire branch of government, the judicial system.[46] Accordingly, when deciding the contours of what conduct is ethical, attorneys must look outside "of parochial or self-interested concerns" to ensure that their conduct steadfastly serves the public interest.[47] Each attorney must act as his or her own compliance officer by voluntarily complying with the letter and spirit of ethics rules, ensuring that other attorneys comply with their ethical obligations, and rigorously enforcing the rules through formal disciplinary systems.[48] In the final analysis, however, ethics rules should strive to provide a practical and workable analytical framework that will safeguard the ethical practice of law.[49] Whenever difficult ethical issues arise, such as attorney deception, attorneys must seek to apply ethics rules to serve the purposes behind the rules, which requires a balancing of duties to clients, the system of justice, participants in that system, and democratic society itself.[50]

To support a self-regulating system there must be clear ethical standards that can be effectively enforced. Once these standards have been adopted, members of the legal profession undoubtedly must "adhere to the highest moral and ethical standards," which must "apply regardless of motive."[51] As attorneys carry out their fundamental duties in our society—from assisting people in understanding their legal rights and obligations to helping resolve legal conflicts—they should

43. *See* MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (2007).
44. *See id.* ¶ 6.
45. *Id.*
46. *See id.* ¶ 10.
47. *Id.* ¶ 12.
48. *See id.* ¶¶ 12, 16.
49. *Id.* ¶ 16.
50. *See id.* ¶ 9.
51. *In re* Pautler, 47 P.3d 1175, 1176 (Colo. 2002) (en banc).

be steadfastly committed to engendering public faith, trust, and confidence in the idea that attorneys conduct themselves diligently, competently, loyally, fairly, and honestly.[52]

After that brief introduction on the purposes behind legal ethics, there really is no way to comfortably transition to the *Model Rules* that govern attorney deception other than to simply get to it. As has been stated, "If you have to eat two frogs, eat the big one first." Thus, I will take a sequential stroll through the *Model Rules* to create the analytical framework that will determine whether attorney deception is ethical. Although this approach might not be ideal, it is important to first digest the framework and standards before discussing cases involving attorney deception that will challenge those standards. This introduction to the relevant *Model Rules*, therefore, will serve as a guide for the rest of this Article.

Part 1 of the *Model Rules* governs the ethical rules relating to the attorney–client relationship. Rule 1.2(d) prohibits an attorney from counseling or assisting a client to engage in criminal or fraudulent conduct.[53] If a client wishes to use the attorney's services to commit a crime or fraud, the attorney cannot simply continue to represent the client. Instead, the attorney must counsel the client to act lawfully, or the attorney must withdraw from the attorney–client relationship.[54] Attorneys serve society by helping to uphold the law, not by helping to violate it.

Rule 1.6 details the ethical contours of an attorney's duty of confidentiality, an all-important duty that builds trust, a hallmark of the attorney–client relationship.[55] Rule 1.6 informs our discussion of attorney deception in two ways. First, the dishonest use of the appearance of an attorney–client relationship to deceive the client into disclosing confidential information erodes the foundation of trust built upon society's understanding of an attorney's ethical duty of confidentiality. The legal profession must carefully protect this foundation. Second, Rule 1.6 lists exceptions to the duty of confidentiality, leaving no doubt that the *Model Rules* contemplate express exceptions to certain rules and grant attorneys the discretion to otherwise violate certain rules under various circumstances. For example, Rule 1.6 permits disclosure of confidential information in limited circumstances.[56] The *Model Rules* also allow permissive withdrawal from

52. *See* Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186, 1193 (Pa. 1994) ("It is well-established that dishonesty on the part of an attorney establishes his unfitness to continue practicing law. Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to truth.") (citing Office of Disciplinary Counsel v. Grisby, 425 A.2d 730, 733 (Pa. 1981)).

53. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007).

54. *See id.* pmbl. ¶ 10, R. 1.16(a), R. 1.2(d), R. 4.1 cmt. 3.

55. *Id.* R. 1.6 cmt. 2.

56. *See id.* R. 1.6.

representing a client in limited circumstances, but, again, it is a matter left to the sole discretion of each attorney.[57] If the *Model Rules* include express exceptions to some rules, it is unlikely that the *Model Rules* also contemplate implied exceptions to other rules. Similar to Rule 1.6's duty of confidentiality, Rule 1.8(b) addresses an attorney's duty of loyalty by prohibiting an attorney from using confidential client information to the client's disadvantage without the client's informed consent, unless the *Model Rules* permit or require such use. Clearly the *Model Rules* place the focus of the attorney–client relationship squarely on the interests of the client to establish a strong foundation of faith and trust.

Part 3 of the *Model Rules* governs the conduct of an attorney acting as an advocate on a client's behalf. Rule 3.1 requires that attorneys only assert claims that have a basis in law and fact. Rule 3.3 requires advocates to exhibit candor toward tribunals, such that an attorney cannot make false statements of fact to a tribunal[58] or offer false evidence.[59] These rules preserve the integrity of the system of justice.[60] There are no exceptions to these rules.

Part 4 of the *Model Rules* regulates an attorney's transactions with persons who are not clients. Rule 4.1 mandates that attorneys act honestly and truthfully when dealing with people on behalf of a client:

> 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; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[61]

False statements or misrepresentations are not limited to outright lies, but include half-truths or half-lies as well.[62] Rule 4.2 limits the ability of an attorney to communicate with persons who are represented by another attorney:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[63]

This prohibition is meant to safeguard the legal system by protecting represented persons against possible overreaching by attorneys with interests in the legal matter, interference by other attorneys with the represented person's attorney–client relationship, and the ignorant

57. *See id.* R. 1.16(b).
58. *Id.* R. 3.3(a)(1).
59. *Id.* R. 3.3(a)(3).
60. *See id.* R. 3.3 cmt. 2.
61. *Id.* R. 4.1; *see id.* R. 4.1 cmt. 1.
62. *Id.* R. 4.1.
63. *Id.* R. 4.2.

disclosure of privileged information.[64] Rule 4.3, on the other hand, governs how an attorney may ethically deal with unrepresented persons:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.[65]

To protect an unrepresented person from his own ignorant assumption that an opposing attorney is somehow disinterested, this rule simply requires an attorney to identify his client and, in some cases, explain that his client's interests conflict with the unrepresented person's interests.[66]

The *Model Rules* codify the concept that if an attorney cannot engage in unethical conduct, then the attorney does not have the option simply to assign the conduct to a subordinate to get the benefit of what the attorney could not do. If an attorney is prohibited from doing something under the *Model Rules*, the general rule is that the attorney cannot direct another person to perform those acts.[67] In essence, these are derivative claims in that the conduct of a third person acting under the direction of the attorney is viewed through the lens of whether the superior may ethically engage in such conduct. For example, Rule 5.1(a) requires that a managing attorney in a law firm "make reasonable efforts to ensure" that all attorneys in the firm comply with the ethics rules.[68] Similarly, an attorney who supervises another attorney must make reasonable efforts to ensure that the attorney complies with the ethics rules.[69] A supervisory attorney is responsible for another attorney's ethical violations when directing the attorney's unethical conduct, ratifying the unethical conduct, or failing to take reasonable remedial action when unethical conduct occurs.[70]

Notwithstanding Rule 5.1's strictures, Rule 5.2(a) explains that a subordinate attorney must still act as her own ethical compliance officer, regardless of the direction she receives from a supervisory attorney.[71] This rule contains a safe-harbor provision, however, that

64. *Id.* R. 4.2 cmt. 1.
65. *Id.* R. 4.3.
66. *Id.* R. 4.3 cmt. 1.
67. *See id.* R. 5.3.
68. *Id.* R. 5.1(a).
69. *Id.* R. 5.1(b).
70. *Id.* R. 5.1(c).
71. *Id.* R. 5.2(a).

exempts otherwise violative conduct in situations in which a subordinate attorney complies with a supervisory attorney's direction when there is a reasonable basis for concluding that the course of conduct is ethical.[72] When the law is unclear on whether it is "reasonably arguable" that a course of conduct is ethical (e.g., the use of attorney deception), the *Model Rules* place the decision making authority for ethics purposes on the supervisory attorney.[73] If there is only one reasonable answer to the ethical question—that answer being that the proposed conduct is unethical—then no safe harbors apply, and both the supervisory and subordinate attorneys must comply with the ethics rules.[74]

The *Model Rules* do not stop with subordinate attorneys. Rule 5.3 ensures that attorneys only use non-attorney assistants in ways that are consistent with the attorney's ethical obligations.[75] This rule prohibits an attorney from doing something through a non-attorney assistant when the attorney could not engage in the conduct herself.[76]

Although perhaps not intuitively applicable to deceptive practices, Rule 7.1 prohibits attorneys from making false or misleading statements about their services. Notably, even truthful statements can still be misleading if they leave out material facts that would lead a reasonable person to reach unsupported conclusions about the attorney's services.[77] Rule 7.1 has not been applied to the attorney deception issue yet. As you read the discussion of various cases, however, keep Rule 7.1 in mind and consider how it could apply to an attorney's use of deception, particularly within the attorney–client relationship itself.

Rule 8.4 is implicated by every dishonest or deceitful act by an attorney, regardless of whether the attorney acts in a representational or non-representational capacity. Not surprisingly, the debate over attorney deception focuses squarely on Rule 8.4. Generally, Part 8 of the *Model Rules* seeks to maintain the integrity of the legal profession. To safeguard that integrity, Rule 8.4 makes it unethical for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,"[78] "engage in conduct involving dishonesty, fraud, deceit or misrepresentation,"[79] or "engage in conduct that is prejudicial to the administration of justice."[80] The official comments interpret what it means to

72. *See id.* R. 5.2(b).
73. *Id.* R. 5.2 cmt. 2.
74. *Id.*
75. *Id.* R. 5.3.
76. *See id.* R. 5.3.
77. *Id.* R. 7.1 cmt. 2.
78. *Id.* R. 8.4(b).
79. *Id.* R. 8.4(c).
80. *Id.* R. 8.4(d).

engage in illegal conduct that reflects adversely on an attorney's fitness to practice law by providing examples, such as fraud, willful failure to file an income tax return, violent offenses, dishonesty, breaches of trust, and serious interferences with the administration of justice.[81] The comments exclude from fitness issues those offenses that involve "moral turpitude," which might include adultery or similar offenses, because these offenses "have no specific connection to fitness for the practice of law."[82] Every case of attorney deception discusses Rule 8.4.

To ensure that an attorney does not seek alternative ways to shirk her ethical responsibilities, Rule 8.4(a) prohibits an attorney from using someone else to violate the *Model Rules*. In essence, the *Model Rules* mean what they say and say what they mean—if it is unethical for an attorney to do something, then it is likewise unethical for an attorney to seek to have someone else engage in the prohibited behavior on the attorney's behalf and for the attorney's benefit. This is nothing new in legal ethics. From the first official ABA ethics code, the 1908 *Canons of Professional Ethics*, attorneys were instructed to prevent their clients from doing things that the attorney could not do, "particularly with reference to their conduct towards [c]ourts, judicial officers, jurors, witnesses and suitors."[83] If a client continued to do things that the attorney could not ethically do, then the *Canons of Professional Ethics* instructed the attorney to terminate the attorney–client relationship.[84] The deception-exception issue directly challenges this longstanding ethical principle that an attorney is prohibited from using another person to do something that the attorney may not ethically do himself.

This Article maintains that the *Model Rules* contain no exceptions that authorize attorney deception, but that they should not prohibit an attorney from directing the use of lawful deception by non-attorneys in limited circumstances. This position challenges Rules 5.1, 5.2, 5.3, and 8.4(a) and their limitations on attorneys using others to do what the attorney cannot do. Similar to the express permissive disclo-

81. *Id.* R. 8.4 cmt. 2.

82. *Id.*

83. CANONS OF PROF'L ETHICS Canon 16 (1908). Two other ethics rules reinforce the principle that lying attorneys are not ethical attorneys. First, Rule 8.3(a) enlists all attorneys to act as compliance regulators through a reporting requirement. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2007). When an attorney knows that another attorney has violated the ethics rules in a way that substantially draws into question the attorney's "honesty, trustworthiness or fitness as a lawyer," that attorney must be reported to the appropriate authority. *Id.* Second, the requirement that attorneys act honestly and free of deception predates their becoming attorneys. Rule 8.1 forbids bar applicants—those seeking admission to the legal profession—from making false statements of material facts or allowing bar authorities to misapprehend certain facts. *Id.* R. 8.1.

84. CANONS OF PROF'L ETHICS Canon 16 (1908).

sure and permissive withdrawal exceptions, the *Model Rules* would best serve its function by having the scope of any permissive investigation deception exception expressly defined in the *Model Rules* rather than through interpretation on a case-by-case basis—an approach virtually guaranteed to create ad-hoc implied exceptions. I propose having a full, open, and fair debate of the attorney deception issue in direct sunlight, rather than having individual attorneys secretly entering the debate where the good of a single client, rather than the good of the profession or the justice system, might take priority. If an attorney who unilaterally chooses to use deception can justify that deception in private, then that same attorney should have little difficulty justifying that deception in public.

IV. ANALYSIS OF THE SCATTERED HISTORY OF CONFRONTING THE ETHICS OF ATTORNEY DECEPTION

The facts of the Haddock case are really nothing new. A long-running debate on whether attorneys may ethically engage in deception has been unresolved and clouded in uncertainty for years.[85] One state supreme court has acknowledged that the issue of whether attorneys may ethically engage in deception is "a matter that is vexing to the Bar, government lawyers, and lawyers in the private practice of law."[86] One bar committee has "recognize[d] that there is no nationwide consensus" on the use of deception by attorneys.[87] Unfortunately, the contours of this debate have been ill-defined, and countless participants in a number of forums have addressed various subtopics in the debate. No real consensus has emerged on whether and when attorneys may lie or deceive. Indeed, little progress has been made in forging a systematic, formal discussion by far-ranging participants to answer the ultimate question on deception. Instead of deferring a discussion of the issue because of its difficulty or, worse, allowing disciplinary bodies to address the issue on a case-by-case basis, the legal profession must engage in an organized and systematic discussion to deal with the systemic issues implicated by attorney deception.[88] At-

85. *See In re* Gatti, 8 P.3d 966, 979 (Or. 2002) (noting that the issue of whether an attorney may ethically engage in deception by misrepresenting his identity or purpose to gather information "has been festering for some time").

86. *Id.* at 976.

87. N.Y. County Lawyers' Ass'n Comm'n on Prof'l Ethics, Formal Op. No. 737 (2007), *available at* http://www.nycla.org/siteFiles/Publications/Publications519_0.pdf.

88. Some commentators have started the ball rolling on debating the attorney deception issue. *See, e.g.*, William H. Fortune, *Lawyers, Covert Activity, and Choice of Evils*, 32 J. LEGAL PROF. 99 (2008) (promoting an amendment of ethical rules to establish a necessity defense in disciplinary cases); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 782 (2006) (arguing the existence of situations requiring an attorney to contravene disciplinary rules);

torneys owe that to each other, the system of justice, and the American public.

It might help to place a few general markers on the terrain to see what ground has been covered. To that end, this Part analyzes attorney deception of a client within the attorney–client relationship, attorney deception of a third person while representing a client, an attorney's direction of third persons to employ lawful deception, and attorney deception when the attorney is acting in a non-representational capacity.

A. You Think I'm Your Attorney: Deception within the Attorney–Client Relationship

The most disturbing use of deception is within the attorney–client relationship itself (i.e., deceiving a person into believing that he is being represented faithfully by an attorney, when in fact he is not). Because the attorney–client relationship holds a special place in the public's view of attorneys, eroding the foundation of trust built upon that relationship can only harm society if deception is left unchecked. For example, the Supreme Court of Colorado reviewed a disciplinary case in which a prosecutor engaged in dishonesty and deception by falsely acting as a public defender to catch a grisly murderer.[89] In response, the court rendered a bright-line decision that attorney deception is not tolerated in Colorado: "Purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as a part of attempting to secure the surrender of a murder suspect. A prosecutor may not deceive an unrepresented person by impersonating a public defender."[90] The court concluded that the offending attorney had "violated a duty he owed the public, the legal system, and the profession."[91] The court also made clear that the attorney's lying "for

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) (discussing the ethical considerations of misrepresentation in gathering evidence and undercover investigations); Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577 (2005) (addressing undercover investigations and surreptitious recording by attorneys); Barry R.Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123 (2008) (addressing indirect attorney deception within the rules of ethics); Livingston Keithley, Comment, *Should a Lawyer Ever Be Allowed to Lie?* People v. Pautler *and a Proposed Duress Exception*, 75 U. COLO. L. REV. 301 (2004) (suggesting a duress exception to violations of ethical rules in rare situations). I contend that the ABA must now pick up the ball and take action on the issue of attorney deception by adopting an express investigation deception exception to the *Model Rules*.

89. *In re* Pautler, 47 P.3d 1175 (Colo. 2002).

90. *Id.* at 1176.

91. *Id.* at 1183.

what he thought was a good reason does not obscure the fact that he lied" and that the attorney's "role of prosecutor makes him an instrument of the legal system, a representative of the system of justice."[92] The court cautioned that the attorney's unethical use of deception could "perpetuate the public's misperception" of the legal profession, a violation of each attorney's "public and professional trust."[93]

What prompted a prosecutor to engage in deception in the first place? After viewing three women whose heads had been crushed by a killer wielding a wood-splitting maul, Chief Deputy District Attorney Mark Pautler learned that the man who had killed these women in cold blood and created the horrific scene was William Neal.[94] Pautler also learned that Neal had abducted and tortured the three victims slowly, raped a fourth victim after splitting open one victim's skull, and left instructions with the fourth victim to page Neal when the police arrived.[95] After police paged and contacted Neal, Deputy Sheriff Cheryl Moore spoke with Neal for three-and-a-half hours, learning the details of the murder while passing messages to Pautler.[96] When encouraged to surrender, Neal made clear that he would not surrender without talking to his former attorney or a public defender.[97] Although Moore promised to secure a public defender for Neal, she actually concocted a ruse to have Pautler act as the requested public defender instead.[98]

Although Pautler knew that a defense attorney would advise Neal not to talk to authorities, Pautler nevertheless agreed to impersonate a public defender and deceive Neal into believing that Pautler was a public defender by the name of Mark Palmer.[99] The deception worked.[100] During Pautler's deceptive conversation with Neal, Neal requested that his attorney be present when he surrendered, to which Pautler responded, "Right, I'll be present."[101] When Neal surrendered, Pautler instructed law enforcement officials to tell Neal that his attorney was present, even though Pautler did not meet with Neal and neither did any other attorney.[102] At no point did Pautler reveal to Neal the deception used to garner his surrender.[103] When an actual public defender later represented Neal and informed him that no

92. *Id.*
93. *Id.*
94. *Id.* at 1176.
95. *Id.* at 1176–77.
96. *Id.* at 1177.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1177–78.
101. *Id.* at 1177.
102. *Id.* at 1178.
103. *Id.*

Mark Palmer existed, it was no surprise that the public defender "had difficulty establishing a trusting relationship with" Neal.[104] Neal later chose to dismiss the public defender and represent himself, resulting in a conviction for the murders and a sentence of death.[105]

Based on these facts, Colorado's Office of Attorney Regulation Counsel charged Pautler with violating Colorado's equivalents to Rules 4.3 and 8.4(c) for how he dealt with the unrepresented Neal and for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[106] Showing no signs of remorse, Pautler testified that if he were presented with the same circumstances, he would still engage in the deception.[107] After deciding that Pautler had violated Rules 4.3 and 8.4(c), the hearing board meted out relatively minor sanctions.[108]

Pautler appealed the decision to the Supreme Court of Colorado. Leaving no doubt how seriously it viewed Pautler's deception, the court set the stage for its analysis with this powerful introduction:

> The jokes, cynicism, and falling public confidence related to lawyers and the legal system may signal that we are not living up to our obligation [to maintain the highest standards of ethical conduct]. . . . [Indeed, the legal profession is trying] to emphasize that truthfulness, honesty and candor are the core of the core values of the legal profession. Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession—as well as at the heart of the system of justice. Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest.[109]

With that introduction, the court stated that Rule 8.4(c)'s prohibition on dishonesty and deception is "devoid of any exception," such that Pautler's justification defense had no merit.[110] The court declared that attorneys do not have the right to choose between deception and forthrightness. The court made clear that even noble motives do not excuse departures from the *Model Rules*, and that even prosecutors like Pautler "cannot involve themselves in deception, even with selfless motives, lest they run afoul of Rule 8.4(c)."[111] When confronted with Pautler's argument that Rule 8.4(c) contains an imminent public-

104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1178–79 (internal quotations omitted). There can be no doubt that the legal profession should strive for a positive public perception of attorneys. Honesty and character certainly build trust and respect. To that end, the public should not perceive attorneys as a bunch of selfish liars. Indeed, society's viewpoint dims when a joke such as the following rings true to some people: "How do you know when an attorney is lying? The attorney's lips are moving." Although such humor is hopefully undeserved, the legal profession can do better.
110. *Id.* at 1179.
111. *Id.* at 1180.

harm exception to justify his deception, the court was "adamant that when presented with choices, at least one of which conforms to the *Rules*, an attorney must not select an option that involves deceit or misrepresentation."[112] After stating that an attorney's ethical standards leave "no room for deceiving Neal in this manner," the court concluded, "Pautler cannot compromise his integrity, and that of our profession, irrespective of the cause."[113] The court rejected the opportunity to create an implied deception exception: "Both of the rules under which Pautler was charged are imperative, not permissive in application. Compliance with their mandatory provisions is required and is not subject to the exercise of discretion by the lawyer."[114]

The Colorado Supreme Court dismissed any notion that a prosecutor has the unilateral right to engage in deception to catch criminals:

> The Rules of Professional Conduct apply to anyone licensed to practice law in Colorado. . . . The Rules speak to the 'role' of attorneys in society; however we do not understand such language as permitting attorneys to move in and out of ethical obligations according to their daily activities. . . . The obligations concomitant with a license to practice law trump obligations concomitant with a lawyer's other duties, even apprehending criminals.[115]

Rejecting any claim that the court's bright-line rule against attorney deception was too rigid an interpretation of Rule 8.4(c), the court announced that it stood "resolute against any suggestion that licensed attorneys in [the] state may deceive or lie or misrepresent, regardless of their reasons for doing so."[116]

Finally, the court condemned Pautler's conduct of representing the State of Colorado as a prosecutor while dealing with Neal, an unrepre-

112. *Id.* at 1180–81.

113. *Id.* at 1181; *see also* State v. Galati, 319 A.2d 220, 223 (N.J. 1974) ("[W]e must notice that in matters of ethics and professional probity, the cause and effect impact upon the public consciousness is almost, perhaps quite, as important as the actual fact."). The *Galati* court further noted that "the fundamental principle of disinterested justice which is the bulwark of our judicial system" mandates that "a community without certainty in the true administration of justice is a community without justice." *Id.* (quoting *In re* Spitalnick, 308 A.2d 1, 2 (N.J. 1973)) (internal quotation marks omitted). Highlighting the importance of perception, the court went on to indicate that "it is vital that justice be administered not only with a balance that is clear and true but also with such eminently fair procedures that the litigants and the public will always have confidence that it is being so administered." *Id.* (quoting State v. Deutsch, 168 A.2d 12, 20 (N.J. 1961)) (internal quotation marks omitted). In short, "justice must satisfy the appearance of justice." *Id.* (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)) (internal quotation marks omitted). "In a free democracy the administration of justice rests very largely not only on Constitution and laws, but upon public confidence in its integrity and impartiality in execution." *Id.*

114. *Id.* (quoting People v. Pautler, 35 P.3d 571, 580 (Colo. 2001) (decision of the disciplinary hearing board)).

115. *Id.* at 1182.

116. *Id.*

sented person, as a clear violation of Rule 4.3.[117] The court also bemoaned the fact that Pautler never informed Neal to retain an attorney, and more troubling, purported to represent Neal in the matter even though Pautler's only goal in the matter was to arrest and prosecute Neal.[118] Ruling that there are no implied exceptions to Rule 4.3 that could authorize Pautler's deception in dealing with the unrepresented Neal, the court concluded that Pautler's conduct was undoubtedly unethical.[119]

The Colorado Supreme Court's unequivocal rejection of Pautler's use of deception to create an apparent attorney–client relationship cannot be understated. Although this Article does not argue that statements by prospective or current clients about committing future crimes are protected by the attorney–client privilege,[120] any discussion of that privilege is misplaced—or at least seriously premature—when confronting the issue of whether an attorney may ethically deceive a person into believing that there is an attorney–client relationship with the goal of using communications against the apparent client. When a client—prospective or current—seeks to violate the law with the attorney's assistance, the attorney must counsel against the unlawful behavior or withdraw.[121] Public policy could not tolerate the attorney's use of deception to create an apparent attorney–client relationship simply to take down the client.

The Supreme Court of Colorado was confronted with just that type of case in *People v. Smith*,[122] a case that paralleled the Haddock situation. James Smith, a criminal-defense attorney suspected of using

117. *Id.*
118. *Id.*
119. *Id.*
120. This claim would be unsupported by public policy and case law. *See, e.g.*, United States v. Zolin, 491 U.S. 554, 562–63 (1989) (explaining the limits of the attorney–client privilege in term of future wrongdoing). "[S]ince the [attorney–client] privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose." *Id.* (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)) (internal quotation marks omitted). "The attorney–client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—'ceases to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*.'" *Id*. (quoting 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)). "It is the purpose of the crime–fraud exception to the attorney–client privilege to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *Id.* (internal quotations omitted). "It is a truism that while the attorney–client privilege stands firm for client's revelations of past conduct, it cannot be used to shield ongoing or intended future criminal conduct." United States v. Chen, 99 F.3d 1495, 1500 (9th Cir. 1996).
121. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2007).
122. 778 P.2d 685 (Colo. 1989).

and dealing cocaine, agreed to act as an undercover government informant to secretly record conversations with a former client.[123] Smith cooperated with law enforcement authorities partly out of fear that criminal drug charges would be brought against him if he did not cooperate.[124] Smith only agreed to record his former client's conversations after the attorney general's office assured him that his conduct would not violate the *Model Rules*.[125] Smith's deceptive undercover efforts worked. His former client spoke freely and incriminatingly to Smith while on tape and subsequently pleaded guilty to felony drug charges.[126]

The Supreme Court of Colorado was not amused with Smith's conduct, regardless of whether government attorneys had condoned the undercover deception. In holding that Smith's deception in recording his conversations with his former client had violated Colorado's equivalent to Rule 8.4(c)'s prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation, the court revealed how Smith's conduct could undermine society's trust in the attorney–client relationship:

> While [Smith] no longer represented [his former client], the conduct in all probability would not have occurred had [Smith] not relied upon the trust and confidence placed in him by [his former client] as a result of the recently completed attorney–client relationship between the two. The undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound.[127]

The court further condemned any effort by private attorneys "to deal dishonestly and deceitfully with clients, former clients and others," because such deception "would fatally undermine the foundation of trust and confidentiality that is essential to the attorney–client relationship in the context of civil as well as criminal proceedings."[128]

The Supreme Court of Iowa also was not amused by an attorney's decision to use deception of the apparent attorney–client relationship to take down the unsuspecting client for the benefit of the attorney. *Committee on Professional Ethics v. Mollman*[129] involved an attorney named Michael Mollman who had used cocaine and marijuana with his friend and former client, Edward Johnson. When federal law-enforcement authorities interviewed Mollman about his criminal conduct, he agreed to secretly record a conversation with Johnson. The

123. *Id.* at 685–86.
124. *Id.* at 686.
125. *Id.*
126. *Id.*
127. *Id.* at 686–87.
128. *Id.* at 687; *see also id.* at 688 (Erickson, J., dissenting) (reiterating that Smith's breach of "the confidential attorney–client relationship" brought "disrespect and a dishonor to the legal profession").
129. 488 N.W.2d 168 (Iowa 1992).

federal agents prepared a script according to which Mollman would suggest to Johnson "that he and Johnson get their stories straight about their past drug usage."[130] The ruse worked, as Johnson incriminated himself on tape when talking to Mollman, and resulted in a felony conviction for drug dealing.[131] After Johnson's conviction, he filed ethics charges against Mollman for the deception.[132]

In addressing those ethics charges, which included violations of Iowa's equivalents to Rules 1.6, 1.8, and 8.4(c), the Iowa Supreme Court acknowledged that the relationship between Mollman and Johnson was unclear—similar to the Haddock situation. Even though Mollman issued a Haddock-like disclaimer that he was not acting as Johnson's attorney, "Johnson testified to his firm belief that Mollman was his attorney, as well as his friend, and that he had confided in him freely about personal matters with the expectation that his confidence would not be betrayed."[133] Even if no attorney–client relationship existed between Mollman and Johnson during the recorded conversations, the court explained that this fact did not allow Mollman to "shed his ethical responsibility" to act honestly without deception.[134] Indeed, the court recognized that the only reason "that Mollman was able to draw incriminating statements out of Johnson [was] precisely because their conversation centered on the legal implications" of their conduct, with Johnson clearly looking to Mollman "for guidance, if not legal advice, on these matters and, in doing so, ma[king] the admissions federal agents wanted."[135] Noting that Mollman secured Johnson's incriminating admissions only through deception, the court stated that employing "trickery" and deception "outside the strict bounds of an attorney–client relationship [was] . . . of only passing significance."[136] Recognizing that Mollman deceptively used the appearance of an attorney–client relationship "to save his own skin [by luring] Johnson into a trap set by federal law enforcement officials," the court held that Mollman's deception had violated Rule 8.4(c).[137] The court declared, "Fundamental honesty is the base line and mandatory requirement to serve in the legal profession."[138]

130. *Id.* at 169–70.
131. *Id.* at 170.
132. *Id.*
133. *Id.*
134. *Id.* at 171.
135. *Id.*
136. *Id.*
137. *Id.*; *see also id.* at 173 (Carter, J., concurring) (stating that "irrespective of whether attorney Mollman communicated a disclaimer of any potential attorney–client relationship, Johnson nevertheless was relying on Mollman for legal advice" and thus "undoubtedly made statements that otherwise would not have been forthcoming").
138. *Id.* at 171 (quoting Comm. on Prof'l Ethics & Conduct v. Wegner, 469 N.W.2d 678 (Iowa 1991)).

Deception within the apparent attorney–client relationship strikes at the heart of society's perception of attorneys. Attorneys must engage in conduct that seeks to increase the public's faith, trust, and confidence in attorneys, which in turn increases faith, trust, and confidence in the administration of justice and rule of law. The public has a strong perception that they can speak fully and frankly with their attorneys. The purpose of the attorney–client privilege itself is to drive clients to attorneys for a full and frank discussion of the relevant facts, laws, and issues such that the attorney can bring as much value as possible in addressing the client's cause.[139] The attorney–client relationship stands at the foundation of trust that supports society's understanding of the privilege. Even though we are not confronted with a privilege issue in the first instance, we are confronted with a question that could erode the foundation of the attorney–client relationship itself—does society expect, or even condone, attorneys using deception against their own clients to investigate suspected wrongdoing?[140]

As explained by the Supreme Court of Ohio, "[I]t is the court's duty to safeguard the preservation of the attorney–client relationship."[141] Accordingly, the court reasoned that "[i]n doing so, a court helps to maintain public confidence in the legal profession and assists in protecting the integrity of the judicial proceeding."[142] Another court has echoed the importance of protecting the attorney–client relationship: "The [attorney–client] relationship is one of trust and confidence, and

139. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). "The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." *Id.* (quoting 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)). The Supreme Court of the United States has been crystal clear on the societal significance of the attorney–client relationship:

> [The purpose of the attorney–client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id.

140. *See* People v. Gerold, 107 N.E. 165, 177 (Ill. 1914) ("It is the glory of the legal profession that its fidelity to its clients can be depended upon; that a man may safely go to a lawyer and converse with him upon his rights in litigation with absolute assurance that that lawyer's tongue is tied from ever discussing it.").

141. Kala v. Aluminum Smelting & Refining Co., 688 N.E.2d 258, 262 (Ohio 1998) (citing Am. Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1128 (5th Cir. 1971)); *see also* Elan Transdermal Ltd. v. Cygnus Therapeutic Sys., 809 F. Supp. 1383, 1390 (N.D. Cal. 1992) (quoting *In re* Complex Asbestos Litigation, 283 Cal. Rptr. 732, 740 (1991)) (explaining that California's ethics rules and law are designed "to preserve the public trust in the scrupulous administration of justice and the integrity of the bar").

142. *Kala*, 688 N.E.2d 258, 262 (citing United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982)).

it is the duty of the courts to preserve it upon a high plane of moral responsibility for the protection of the public."[143] The *Model Rules* also consider the importance of the attorney–client relationship:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. . . . So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.[144]

It probably goes without saying that law enforcement investigations would increase their productivity if they simply focused on having criminal-defense attorneys act as undercover government informants against their clients. There would be abundantly fertile fields for picking up criminals if we were to use their own attorneys against them. Because criminal-defense clients would, at least initially, operate under the assumption that their attorneys represent their best interests against the state, a client would speak freely without any reservation that his attorney actually works for the state in the case against him. However, this cross-your-fingers-and-hope-the-clients-don't-find-out approach to attorney deception would have limited use over the long-term. The use of attorney deception within the attorney–client relationship would strike, perhaps, a fatal blow to the foundation of trust that the public has in that relationship. Undoubtedly, generations of building trust and confidence in the legal profession can be eroded in short order. The result would be criminal clients who have no trust or faith that attorneys are on their side, much like Neal's response when he learned about Pautler's deception, or Johnson's response when he learned about Mollman's deception.

Like the popular children's game Jenga, of all of the building blocks to our justice system, the block that society should not touch is the cornerstone—a client should expect that her attorney is on her side and is not actively promoting the attorney–client relationship as a ruse.[145] To pull the cornerstone is to risk toppling the legal profession itself. We must protect the attorney–client relationship at all costs to build the perception that our judicial system is honest and fair. We want to encourage citizens to seek attorneys in confidence for assistance in complying with the law and in getting a fair shake when there are allegations that the law has been violated. Although attorneys undoubtedly strive to help their clients comply with the law, cli-

143. Riddle v. Commonwealth, 864 S.W.2d 308, 311 (Ky. Ct. App. 1993) (quoting *In re* Gilbert, 118 S.W.2d 535, 537 (Ky. 1938)).

144. MODEL RULES OF PROF'L CONDUCT pmbl. ¶8 (2007).

145. *See* Lorain County Bar Ass'n v. Noll, 821 N.E.2d 988, 992 (Ohio 2004) ("The interests of the lawyer's clients—not the lawyer's own personal interests—must always come first. A lawyer must be vigilant at all times in protecting the welfare of clients.").

ents often unwittingly engage in criminal conduct. Notwithstanding the possibility that clients may violate the law, the "valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants."[146]

We dare not trample on the precarious attorney–client relationship just to make it easier to catch criminals. No deception exception should ever condone Haddock-, Pautler-, Smith-, or Mollman-like behavior in using deception to create an apparent attorney–client relationship in order to catch a criminal.

B. You Can't Trust Me: Deception when Acting as an Attorney for a Client

Although it seems fundamental that public policy cannot support an attorney's deceptive use of the attorney–client relationship against an unsuspecting client, what about an attorney's use of deception on a client's behalf? Attorneys may find themselves wishing to use deception to discover helpful information for a client. When an attorney seeks to use deception to help a client, do the *Model Rules* impliedly authorize that deception? I agree with most authorities that there is no such implied exception.

The Supreme Court of Oregon addressed a disciplinary case against an attorney who used deception to try to uncover insurance fraud in the course of representing clients.[147] Ironically, the attorney was introduced to the deception idea when he witnessed government attorneys supervising the use of deception to gather evidence to show that the attorney's clients had engaged in fraud.[148] While acting as an attorney for chiropractors who had been charged with fraud, Daniel Gatti filed an ethics complaint against various government attorneys with the Oregon State Bar.[149] Gatti claimed that the government attorneys had acted unethically by advising undercover investigators to pose as employees or injured persons to discover information on fraudulent workers compensation claims.[150] The Oregon State Bar's Office of Disciplinary Counsel informed Gatti that although it "is not clear" whether government attorneys "have more latitude" in engaging in deception than private attorneys, the counsel's "preliminary conclusion" was that because government agencies "have public authority to root out possible fraud, then [government] attorneys assisting [an agency] in this endeavor are not acting unethically

146. United States v. Chen, 99 F.3d 1495, 1500 (9th Cir. 1995).
147. *In re* Gatti, 8 P.3d 966, 968–80 (Or. 2000) (en banc).
148. *Id.* at 969–70.
149. *Id.* at 969.
150. *Id.*

in providing advice on how to conduct a legal undercover operation."[151] The State Professional Responsibility Board later informed Gatti that it, too, concluded that there was no evidence that the government attorneys had violated Oregon's ethics rules.[152] Based on Gatti's subsequent conduct, he took these responses to heart.

While representing a client at a later date, Gatti suspected that a company called Comprehensive Medical Review (CMR) was using non-medical personnel to deny medical claims submitted to State Farm Insurance Company.[153] Even though Gatti made no effort to further study whether an attorney "who misrepresents his or her identity or purpose violates lawyer disciplinary rules," he nonetheless used deception in making a series of three investigatory telephone calls to CMR.[154] Gatti first called Dr. Becker, a chiropractor who served as a medical reviewer for CMR, because Gatti believed that State Farm had denied a client's claim based on Becker's report.[155] Gatti recorded a telephone conversation in which he inquired as to Becker's qualifications and lied about being a chiropractor himself.[156] Gatti made a second phone call to Adams, a CMR executive.[157] During this telephone conversation, which he likewise recorded, Gatti again lied by claiming that he was a doctor who performed independent medical examinations, reviewed insurance claims, saw patients, was referred to CMR by Becker and State Farm, and wanted to work for CMR as a medical reviewer.[158] Believing that Gatti was a chiropractor who could work for CMR, Adams referred Gatti to a CMR employee named Householder.[159] Gatti then called Householder to discuss employment with CMR, but Householder knew that Gatti actually was an attorney who was not interested in working for CMR.[160] Based in part upon his telephone conversations with Becker, Adams, and Householder, Gatti later filed a federal lawsuit alleging fraud against CMR, State Farm, and Householder.[161]

A month later, Adams filed an ethics complaint against Gatti with the Oregon State Bar.[162] Gatti defended his conduct by stating that he never misrepresented to CMR that he was a doctor, claiming that the statement was true because he was a doctor of jurisprudence.[163]

151. *Id.* (emphasis omitted).
152. *Id.*
153. *Id.* at 969–70.
154. *Id.* at 970.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 971.

Further, Gatti claimed that even if he engaged in misrepresentations, he acted ethically because he "was conducting a fraud investigation on behalf of several clients."[164] The transcripts of Gatti's telephone calls to CMR left no doubt that he used deception during the calls.[165] Based on Gatti's deception during his telephone calls, he was charged with unethically engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Oregon's equivalent to Rule 8.4(c) and knowingly making a false statement of law or fact while representing a client in violation of Oregon's equivalent to Rule 4.1(a).[166] Gatti allegedly misrepresented that he was a chiropractor, performed independent medical examinations, wanted to work for CMR, performed case reviews, and saw patients.[167] It was also alleged that Gatti "failed to disclose that he was a lawyer, that he was preparing to sue CMR, and that he hoped that he would obtain information from the telephone calls that he could use in claims against CMR and Adams."[168]

In addressing these ethics charges, the Oregon Supreme Court confronted the substance of Gatti's argument that he did not violate the ethics rules because he merely misrepresented his identity and purpose to obtain information in his fraud investigation.[169] Drawing a bright line against attorney deception, the court had little difficulty in deciding that Gatti violated Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation.[170] The court recognized that Gatti intentionally misrepresented material facts and engaged in deception when he spoke to Becker and Adams to entice them into providing damaging information about CMR.[171] The court spent little time explaining its holding that Gatti acted unethically while representing a client by lying that he was a chiropractor, saw patients, performed independent medical examinations, and wanted

164. *Id.*
165. *Id.* at 972.
166. *Id.* at 973 (quoting Oregon's equivalent to Rules 8.4(c) and 4.1(a)).
167. *Id.*
168. *Id.*
169. *Id.* The Oregon Supreme Court's first order of business was deciding whether the state bar was estopped from pursuing its claim against Gatti because of how it handled his ethics complaints against the government attorneys. *Id.* at 972–73. Deflecting that argument, the court concluded that Oregon law did not authorize attorneys to misrepresent their identity while practicing law and that the state bar had never informed Gatti that attorneys "in the private practice of law may misrepresent their identity or purpose in investigating a matter." *Id.* Additionally, the court noted that any advice an attorney received from disciplinary counsel would not constitute a defense to a disciplinary violation. *Id.* (citing *In re* Ainsworth, 614 P.2d 1127, 1133 (Or. 1980) (en banc)). In essence, the court was eager to rebut Gatti's claim that attorney deception was authorized by Oregon's ethics rules.
170. *Id.* at 973–74.
171. *Id.*

to work for CMR.[172] The court declared that Gatti had no authority to misrepresent his "identity and purpose when contacting someone who is likely to be adverse to the lawyer's client."[173]

After concluding that Gatti's deception violated the black-letter ethics rules, the court addressed Gatti's contention that the prohibition on attorney deception contains an implied investigation exception that allows private attorneys to "root out evil."[174] Numerous constituencies filed amicus briefs to support a holding that recognized an investigation exception to ethical restraints on attorney deception. For example, the United States Attorney for the District of Oregon, the Attorney General for the State of Oregon, the Oregon Consumer League, the Fair Housing Counsel of Oregon, the Oregon Law Center, and numerous individual attorneys all endorsed as behaving ethically attorneys who engage in dishonesty, fraud, deceit, or misrepresentation—at least as to the attorney's identity and purpose—when investigating unlawful conduct.[175] Indeed, the premise for the investigation exception lies in the idea that deception might be the only way to determine if a person is violating the law, such that the public only stands to benefit by attorney deception.[176] From these arguments alone, the scope of the investigation exception would authorize public and private attorneys to freely engage in deception to investigate suspected criminal violations, violations of anti-discrimination statutes, and anyone else "who is the subject of an investigation for the purpose of gathering facts before filing suit."[177] From a fair and simple reading of these arguments, this investigation exception would permit any attorney to engage in deception whenever someone might be violating the law.[178]

The court noted that each justice was a member of the Oregon Bar, some justices had served as government attorneys, and other justices had worked in private practice before joining the judiciary.[179] Based on the diverse experiences of its members, the court readily recognized "that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair prac-

172. *Id.* at 974.
173. *Id.*
174. *Id.*
175. *Id.* at 974–75; *In re* PRB Docket No. 2007-046, 989 A.2d 523, 530 (Vt. 2009) (acknowledging "that there may be circumstances in which misrepresentations that facially violate the [*Model Rules*] are useful, perhaps even necessary, to the functioning of the law-enforcement and judicial systems").
176. *Gatti*, 8 P.3d at 975.
177. *Id.* (quoting Or. Consumer League et al. as Amici Curiae Supporting Respondents, *In re* Gatti, 8 P.3d 966 (Or. 2000) (internal quotation marks omitted)).
178. *Id.*
179. *Id.* at 976.

tices, and that lawyers in both the public and private sectors have relied on such tactics."[180] Notwithstanding that line of reasoning, the court refused to create an implied deception exception:

> Faithful adherence to the wording of [our ethics rules] and this court's case law does not permit recognition of an exception for *any* lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree. Instead, any exception must await the full debate that is contemplated by the process for adopting and amending [Oregon's ethics rules] . . . . Those disciplinary rules . . . apply to all members of the Bar, without exception.[181]

Rejecting an implied investigation deception exception, the court held that Gatti acted unethically when he engaged in deception.[182]

After holding that Gatti violated the ethics rules through his deception, the court addressed the appropriate sanction.[183] The court explained that a guiding purpose of attorney discipline is to protect clients, the public, the administration of justice, and the legal profession from attorneys who do not ethically discharge their duties.[184] Noting that the public expects attorneys to act honestly, the court decided that Gatti violated that duty by intentionally deceiving, misrepresenting his identity and purpose, and lying to Becker and Adams.[185] The court also recognized that Gatti used deception solely to gain access to confidential information of CMR that would negatively impact its legal rights.[186] The court recognized, however, that Gatti's use of deception arose out of his belief that he could ethically conduct a "private sting"[187] to "root out evil."[188] According to the court, Gatti "sincerely believed, and still believes, that lawyers must be permitted to make misrepresentations and false statements of identity and purpose to discover information without violating the disciplinary rules."[189] The court stated that significant suspensions from practicing law are routine sanctions for engaging in conduct involving dishonesty, fraud,

180. *Id.*

181. *Id.* (internal citations omitted); *see also In re* PRB Docket No. 2007-046, 989 A.2d 523, 530 (Vt. 2009) (announcing that a court is the wrong forum in which to amend the *Model Rules*; instead, because change should come "through a process that allows input from, and collaboration among, all of the groups potentially affected by a rule change," the court established a joint committee "to consider whether the rules should be amended to allow for some investigatory misrepresentations, and, if so, by whom and under what circumstances").

182. *Gatti*, 8 P.3d at 976–77.

183. *Id.* at 977–80.

184. *Id.* at 977 (citing JOINT COMM. ON PROF'L SANCTIONS, AM. BAR. ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS 1.1 (1991)).

185. *Id.* at 977–78.

186. *Id.* at 978.

187. *Id.* at 979.

188. *Id.* at 974.

189. *Id.*

deceit, or misrepresentation and making false statements of fact.[190] Notwithstanding the seriousness of Gatti's ethical misconduct, the court recognized that Gatti was not alone in subjectively, yet erroneously, believing that an attorney has the implied right to use deception to investigate suspected wrongdoing.[191]

Concluding that Gatti's case "brought to the surface an issue that has been festering for some time, namely, whether *any* lawyer may misrepresent his or her identity or purpose to gather information without violating the [ethics rules]," the court acknowledged that Gatti was joined by both public and private attorneys who "in good faith have held the mistaken belief that they ethically are permitted to misrepresent their identity and purpose, and to encourage others to do so, to acquire information."[192] Treating Gatti under the old saying that "there but by the Grace of God go I" and stating that "it is a fortuity that [Gatti], rather than some other Oregon lawyer, is the subject of these proceedings," the court held that Gatti deserved only a public reprimand for his unethical misconduct.[193]

Shortly following *Gatti*, the Oregon Supreme Court again confronted a disciplinary case involving attorney deception. In the case of *In re Ositis*,[194] a private attorney named Andrew Ositis hired an investigator to use deception to interview a potential party to a legal dispute. Ositis maintained that Oregon's equivalent to Rule 8.4(c) "should not be interpreted to apply to misrepresentations made directly or indirectly by a lawyer that go solely to the lawyer's identity and purpose and that are made for the purpose of gathering information from potential adversaries before the institution of a legal action."[195] Following *Gatti* in rejecting an implied deception exception, the court held that Ositis had violated Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, because misrepresentation as to "identity and purpose by nondisclosure" is no less unethical than doing so by "affirmative falsehood."[196] Additionally, the court held that Ositis had violated Oregon's equivalent to Rule 8.4(a) by trying to circumvent the ethics rules by using another person to employ the deception.[197] Thus, the court made clear that there was no investigation deception exception to the *Model Rules* and that attorneys had no authority to direct an investigator to use deception, even if such deception is otherwise lawful. To be sure, the court

190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 979–80.
194. 40 P.3d 500, 501 (Or. 2002).
195. *Id.* at 502.
196. *Id.* at 502–03.
197. *Id.* at 503–04.

was applying the longstanding principle that an attorney cannot assign to someone else what the attorney cannot ethically do himself.

In response to the *Gatti* case, constituencies in Oregon openly debated the issue of attorney deception and significantly changed its laws and ethics rules. In the summer of 2001, Oregon passed a law that authorized government attorneys to engage in deception and misrepresentation to effectively enforce the state's laws.[198] Showcasing the importance of attorney deception to effective law enforcement, the legislature declared that this law was an emergency piece of legislation that was "necessary for the immediate preservation of the public peace, health and safety."[199] Notably, Oregon refused to extend the deception exception to private attorneys, leaving only government attorneys with the authority to employ deception to root out wrongdoing.[200] This expression of public policy did not withstand scrutiny for long. Soon thereafter, Oregon amended its version of Rule 8.4 to authorize any attorney—public or private—to direct clients or other persons to engage in deception or misrepresentations "in the investigation of violations of civil or criminal law or constitutional rights" so long as the attorney otherwise complies with the M*odel Rules* and has a good-faith belief that "unlawful activity has taken place, is taking place or will take place in the foreseeable future."[201]

Because of the complicated history of the attorney deception issue in Oregon, the Oregon State Bar Association Board of Governors issued an advisory opinion entitled *Dishonesty and Misrepresentation: Participation in Covert Investigations*.[202] In this opinion, the Oregon Bar discussed three scenarios to test the interpretation and application of the new investigation deception exception. For the most part, the Oregon Bar simply defined terms used in the new exception. As such, the opinion does not merit much discussion. Notably, however, the opinion makes clear that the scope of the investigation deception exception does not include an attorney's personal use of deception.[203] To "preserve the fundamental tenet of the basic truthfulness of the words spoken" by an attorney, the opinion concludes that the new safe-harbor exception is intended only to permit an attorney to advise

198. *See* OR. REV. STAT. § 9.528 (2001).
199. Act of June 28, 2001, ch. 667, 2001 Or. Laws 1696, 1697.
200. OR. REV. STAT. § 9.528(2) (2001).
201. OR. RULES OF PROF'L CONDUCT 8.4(b) (2009).
202. Or. State Bar, Formal Op. 2005-173 (2005), *available at* http://www.osbar.org/_docs/ethics/2005-173.pdf. This replaced *Formal Op. 2003-173*, which was decided under the former *Oregon Code of Professional Responsibility*. Or. State Bar, *Formal Ethics Opinion Library — Table of Contents*, http://www.osbar.org/ethics/toc.html (last visited July 19, 2010) ("In September 2005, the Board of Governors approved the issuance of Formal Ethics Opinions 2005-1 through 2005-175 to replace the previous Formal Ethics Opinions issued between 1991 and 2004.")
203. *Id.* at 484.

and supervise others in the use of deception in an investigation into unlawful activity, not to participate directly in the deceptive activity.[204]

Oregon's full and open debate reached the perfect conclusion—attorneys should act honestly without deception, but investigators and clients who lawfully employ deception to discover unlawful activity should not be limited by attorney ethics rules. Additionally, Oregon's express investigation deception exception provides the proper guidance to attorneys who may wish to direct others to employ deception to root out lawlessness. Indeed, the ethical problem with Gatti's position—that he had the authority to employ deception for his client's case—really did not come down to deception in the broadest sense, but whether an attorney may personally employ deception. As implied from the facts, the government attorneys who prompted Gatti's deception did not personally engage in deception, but rather directed investigators to use deception to uncover unlawful activity.[205] Courts have long-accepted the necessity of allowing law enforcement to employ deception to catch criminals.[206] This practice apparently later convinced Ositis that he could simply hire an investigator to employ deception to discover unlawful activity.

Thus, the fighting issue was whether the *Model Rules* contain an implied investigation deception exception—the Oregon Supreme Court resoundingly and correctly answered no. The next question, as a matter of public policy, became whether the *Model Rules* should authorize attorneys to personally engage in deception or at least not prohibit attorneys from directing others to employ lawful deception. Because no sound public policy cries out for attorneys to occupy that role, the *Model Rules* should continue to prohibit attorney deception. The *Model Rules* should be amended, however, to create an express investigation deception exception that would allow attorneys to direct non-attorneys to use lawful deception during investigations of unlawful activity. The ABA should follow Oregon's lead. To assist in that regard, I propose an express investigation deception exception in Part VI below.

Gatti is not the only attorney who sought to use deception for the benefit of his clients. The Supreme Judicial Court of Massachusetts addressed attorney deception in a case where an attorney used deception to try to remove a judge.[207] Kevin P. Curry was an attorney in a

204. *Id.*

205. *In re* Gatti, 8 P.3d 966, 969 (Or. 2000).

206. *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545, 557 (1977) ("Our cases, however, have recognized the unfortunate necessity of undercover work and the value it often is to effective law enforcement.").

207. *In re* Curry, 880 N.E.2d 388, 388 (Mass. 2008).

high-stakes civil case.[208] After Judge Lopez entered an adverse decision in the case, Curry told his clients that Judge Lopez had "fixed" the case against them,[209] although Curry had no evidence indicating that Judge Lopez was biased.[210] Not surprisingly, Curry's clients were incensed by the possibility that they did not get a fair decision after spending millions of dollars in legal fees, and they encouraged Curry to investigate the judge's bias to find evidence that could overturn the decision.[211] Curry then began investigating Judge Lopez.[212] During the investigation, Curry obtained the résumé of Judge Lopez's former law clerk who had worked on the case.[213] Curry and his private investigator, Ernest Reid, then developed a ruse to try to gather information about Judge Lopez's decision making process in the case.[214] Curry and Reid met with the former law clerk several times under the guise of interviewing him for a potential lucrative legal position, the clerk's "dream job," which actually did not exist.[215] They created a sham company and elaborate fake identities, and they even paid for the former law clerk to fly to Halifax, Virginia, and New York City for fake interviews.[216] After Curry and Reid learned that the former law clerk had drafted the opinion in the case, they used the information from these meetings to determine how the opinion had been written and to discover damaging information about the judge.[217]

Appearing before the Supreme Judicial Court of Massachusetts, Curry contested a recommendation by the Board of Bar Overseers that he be disbarred as a result of his deception.[218] Upholding disbarment, the court found that Curry had violated a number of Massachusetts's ethics rules equivalent to the *Model Rules*, including (1) Rule 8.4(c)'s prohibition against dishonesty, fraud, deceit, or misrepresentation by his elaborate and deceptive scheme to obtain damaging information about Judge Lopez;[219] (2) Rule 4.1(a)'s prohibition against knowingly making a false statement of fact by his deceptive ruse creating a sham company with fake executives;[220] (3) Rule 8.4(d)'s prohibition against conduct that is prejudicial to the administration of justice by trying to disqualify Judge Lopez from the case without hav-

208. *Id.* at 392–94.
209. *Id.* at 392, 395.
210. *Id.* at 395.
211. *Id*. at 394–95.
212. *Id.* at 395.
213. *Id.* at 395–96.
214. *Id.* at 396.
215. *Id.*
216. *Id.* at 396–400; *In re* Crossen, 880 N.E.2d 352, 360–62 (Mass. 2008) (companion case to *Curry*).
217. *Id.* at 396, 398–400.
218. *Id.* at 391.
219. *Id.* at 400–01, 403–05.
220. *Id.*

ing any credible evidence that the judge was biased;[221] (4) Rule 8.4(b)–(d)'s prohibition against conduct that adversely reflects on an attorney's fitness to practice law by his deception and utter disrespect for the court;[222] (5) Rule 1.2(d)'s prohibition against assisting a client in conduct that is illegal or fraudulent by encouraging his clients to authorize and fund multiple attempts to pressure the former law clerk through dishonesty, fraud, deceit, and misrepresentation;[223] and (6) Rule 8.4(a)'s prohibition against circumventing the *Model Rules* through enlisting another to do what the attorney is ethically prohibited from doing himself—namely, employing an investigator to use deception to gain information about Judge Lopez.[224] Curry was not the only attorney who had engaged in this unethical deception. Another attorney, Gary C. Crossen, joined in the deception, and he was also disbarred.[225]

If Curry and Crossen would have had any reasonable basis for believing that the judge had engaged in unlawful activity, the issue of whether an attorney can use deception to ferret out judicial lawlessness would have been more tenuous. However, even if based upon a reasonable belief of judicial unlawfulness, such a situation would still not automatically insulate attorneys from ethical charges for using deception, because the *Model Rules* contain no exceptions that allow the behavior exhibited by Curry and Crossen. Does mere suspicion of judicial wrongdoing warrant giving attorneys unilateral authority to investigate the wrongdoing through the use of deception? The answer is no. It is better policy to continue to allow non-attorneys to employ deception in investigations of wrongdoing, rather than granting that authority to attorneys. If lawful deception is the only tool that can effectively discover unlawful activity, it would make little sense to prohibit non-attorneys from employing such deception. It also makes little sense to apply rules governing the ethical conduct of attorneys to non-attorneys who may otherwise lawfully employ deception to uncover unlawful activity. The *Model Rules* should solely confront attorney conduct that negatively impacts the legal profession, the judicial system, and the rule of law. If attorneys personally employ deception, the slippery slope of lies, deceit, fraud, and misrepresentations will be hard to stop. If this deceptive conduct reinforces negative stereotypes of attorneys as liars and cheats and encourages people to avoid attorneys, then the legal profession's standing and ability to support our judicial system and the rule of law will diminish. Because there is no pressing need for attorneys themselves to engage in deception, the

221. *Id.* at 405–07.
222. *Id.* at 407
223. *Id.* at 407–08.
224. *Id.* at 408.
225. *In re* Crossen, 880 N.E.2d 352, 356–58 (Mass. 2008).

Model Rules should continue to require the utmost honesty from members of the bar, but leave well enough alone the lawful use of deception by others if society deems that deception helpful to serve the greater good.

The slippery slope underlying authorizing attorneys to personally employ deception is marked by a few cases revealing that some attorneys believe they may ethically employ deception upon the court itself. This behavior not only implicates the *Model Rules*, but it also brings the system of justice into disrepute. A Colorado prosecutor employed deception as part of undercover investigations into drug trafficking by filing a false criminal complaint and other documents with the court and allowing a witness to make false statements in court.[226] The Supreme Court of Colorado held that the prosecutor had violated Colorado's equivalent to Rule 8.4(c)–(d) by committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaging in conduct prejudicial to the administration of justice.[227] Explaining that prosecutors "owe a very high duty to the public" and that their responsibility to enforce the laws does not authorize them to violate the *Model Rules*, the court concluded that the prosecutor had acted unethically, notwithstanding his "motives and the erroneous belief of other public prosecutors that [his] conduct was ethical."[228] Again, once an implied ends-justify-the-means deception exception is unleashed, it becomes exceedingly difficult to put it back in the bottle. It also becomes difficult to regulate attorney deception, because any attorney wishing to employ deception would simply argue that the deception justifiably serves the public. The *Model Rules* would face an assault of exceptions. These exceptions should only be rendered after a full and open debate, and then drafted in the strictest terms possible to engender faith and trust in attorneys.

In a similar case, the Review Board of the Illinois Attorney Registration and Disciplinary Commission likewise concluded that a prosecutor violated Illinois's equivalent to Rule 8.4(c)'s prohibition against engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation by preparing and delivering a false document appearing to be a court order in an effort to protect an abducted child.[229] The Review Board determined that drafting a phony court order constituted unethical deception, and that the Rule's prohibition of deception con-

226. People v. Reichman, 819 P.2d 1035, 1035–36 (Colo. 1991) (en banc).

227. *Id.* at 1035, 1038.

228. *Id.* at 1038–39.

229. Review Bd. of Ill. Attorney Registration & Disciplinary Comm'n, Disciplinary Op. No. 91 CH 348, at 1 (1994), 1994 WL 929289.

tains no express or implied exceptions.[230] However, the Review Board was not unanimous in concluding that the prosecutor had violated Rule 8.4(c). Dissenting, three of the nine members concluded that the prosecutor had not violated Rule 8.4(c) because the safety of a child necessitated the deception.[231] Indeed, the dissenting members characterized the issue of attorney deception as "murky waters."[232]

The waters surrounding the issue of attorney deception will become far less murky if the ABA adopts an express investigation deception exception while keeping intact the bright-line rule prohibiting attorneys from engaging in dishonesty, fraud, deceit, and misrepresentation. However, if courts or disciplinary bodies choose to discover and define implied deception exceptions on a case-by-case basis, the waters will become even murkier. To brighten the waters and clear the murk, a large dose of sunlight should pour over the issue of attorney deception in a full and open debate of the issue resulting in the adoption of a narrowly tailored investigation deception exception.

From *Gatti* to *Curry* to *Crossen*, courts take a dim view of attorneys using deception on a client's behalf, especially because the *Model Rules* contain no express deception exception. Although numerous friends of the court in *Gatti* petitioned for an interpretation of the *Model Rules* that would include an implied deception exception, there simply is no such exception.[233] Even if a court were tempted to judicially decree a deception exception—an invitation the *Gatti* court expressly declined—the scope and contours of such an exception necessarily could only develop on a case-by-case basis after attorneys unilaterally decided, at their own peril, to employ deception on a client's behalf. As seen in the next section, sound public policy supports society's call for deception in certain investigations of wrongdoing. However, no public policy supports making attorneys the source of deception. Ultimately, Oregon demonstrated the best approach to the issue of attorney deception by conducting a full and open debate of the issue. This debate resulted in keeping intact the prohibition of attorney deception while untethering from attorney ethics rules the lawful use of deception by non-attorneys.[234] Oregon's shining example needs to be replicated nationally.

230. *Id.* at 5.

231. Id. at 7–9.

232. *Id.* at 7–8 (citing *In re* Friedman, 392 N.E.2d 1333 (Ill. 1979)).

233. *In re* Gatti, 8 P.3d 966, 968, 974–76 (Or. 2000).

234. The ABA's Standing Committee on Ethics and Professional Responsibility has also addressed attorney deception on behalf of a client. The Committee opined that an attorney who records a conversation without the knowledge of the other party to the conversation does not necessarily violate the *Model Rules*, even though deception is required to hide the purpose of the conversation. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422, at 1–5 (2001) (withdrawing the contradictory *Formal Op. 337* that concluded that attorneys

C. I Didn't Deceive, I Just Told Someone Else to Deceive: Derivative Ethics Claims for Attorneys Directing Other Persons to Engage in Deception

If an attorney may not personally engage in deception, should it be ethical for an attorney to direct non-attorneys to lawfully employ deception in their investigations of unlawful activity? In an insightful and influential law review article[235] on attorney deception,[236] David B. Isbell, a former chairperson of the ABA Standing Committee on Ethics and Professional Responsibility,[237] and Lucantonio N. Salvi argue that the *Model Rules* authorize attorneys to use "misrepresentations solely with regard to identity and purpose, and solely for evidence-gathering purposes, by investigators and testers acting under the direction of lawyers."[238] The Isbell–Salvi article promoted an implied investigation deception exception which authorizes attorneys to direct non-attorney investigators[239] to use deception to discover unlawful activity. Although I agree that non-attorney investigators should not be restrained from using lawful deception to discover unlawful activity by a set of ethics rules that govern attorney conduct, I disagree that the *Model Rules* impliedly authorize attorneys

---

may not ethically record conversations without informing all parties to the conversation). The opinion also declared, however, that an attorney cannot record conversations in violation of the law or misrepresent that the conversation is not being recorded. *Id.* at 5–6. Interestingly, the Committee refused to address the festering issue of whether attorney deception is generally ethical: "The Committee does not address . . . the application of the *Model Rules* to deceitful, but lawful conduct by lawyers, either directly or through supervision of the activities of agents and investigators, that often accompanies nonconsensual recording of conversations in investigations of criminal activity, discriminatory practices, and trademark infringement." *Id.* at 1–2. Notwithstanding its reluctance to address deception by attorneys or testers and investigators at an attorney's direction, the Committee favorably cited the Isbell and Salvi article, see *infra* notes 236–75 and accompanying text, and the *Apple Corps* case, see *infra* notes 389–413 and accompanying text, both of which conclude that attorney deception is authorized when conducting investigations into unlawful activity. *Id.* at 2 n.4. The refusal to address the thorny issue of attorney deception cries out for resolution.

235. I use the term "influential" in the sense that the article is frequently cited. For example, as of September 21, 2010, Westlaw reports that this article has been cited eighty-nine times. I use the term "insightful" in the sense that, as will be seen in my analysis below, the article lends a great deal to the discussion of whether the *Model Rules* authorize—or should authorize—the use of attorney deception, particularly in investigations of unlawful conduct that can only be discovered through the use of deception.

236. 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).

237. *Id.* at 791 n.*.

238. *Id.* at 796.

239. By "non-attorney investigators," I mean investigators who are not also acting in the capacity of attorneys.

to direct the deception due to the derivative nature of Rules 5.1, 5.2, 5.3, and 8.4(a). Instead, the *Model Rules* must be amended to create an express investigation deception exception to accommodate the good that can come from an attorney directing the use of deception by non-attorneys.

Isbell and Salvi primarily focus their attention on attorneys who direct discrimination testers and undercover investigators to use deception to uncover unlawful activity.[240] The authors explain that discrimination testers are valuable because they "detect and collect evidence of discriminatory practices in employment, housing, public accommodations and access to financing," which, in turn, "assists in dealing with employment discrimination [and other kinds of unlawful discrimination] that would otherwise be undetected or unprovable."[241] The premise is that because attorneys routinely employ testers and "investigators in a variety of situations as a means of ascertaining facts, gathering evidence, and detecting unlawful behavior," deception often is required if the investigators are to be effective.[242]

Before addressing whether attorneys may ethically direct discrimination testers and undercover investigators to engage in deception, Isbell and Salvi first make the case that using testers and investigators is socially desirable for four reasons.[243] First, using testers and investigators serves society's interest in enforcing the law by catching wrongdoers.[244] Second, testers and investigators often are the only people who are able to effectively discover, and ultimately prove, violations of the law.[245] To be useful, testers and investigators must conceal their identity and true purpose.[246] Third, because courts have approved the use of testers and investigators, the only real drawback to their use might be attorney ethics rules that prohibit attorney deception or an attorney directing the use of deception by others.[247] Fourth, public and private attorneys already widely employ testers and investigators.[248] The authors concluded that "there are circumstances where deception is justified in the search for truth" such "that the scales of social policy tip markedly in favor of the use of under-

240. The authors use the term "undercover investigator" to mean an investigator who disguises their identity or purpose in order to achieve their objective. *Id.* at 792–93. The authors use the term "tester" to mean a person who poses as an applicant for an opportunity open to the general public in order to detect more invidious forms of discrimination. *Id.* at 793. Examples of such a "tester" include an applicant for housing, employment, or other similar opportunity. *Id.*

241. *Id.* at 796–97.

242. *Id.* at 800.

243. *Id.* at 801.

244. *Id.* at 801–02.

245. *See id.* at 802.

246. *See id.*

247. *See id.* at 799–800, 802–03.

248. *Id.* at 803.

cover investigators and discrimination testers, despite the deceptions necessarily entailed."[249] These are strong reasons supporting the lawful use of deception.

Isbell and Salvi next address whether government attorneys should have more ethical leeway to employ deception to serve the public good, and conclude that "there is no solid basis for a generalized *ethical* distinction between government and private lawyers, exempting the former from applicable restrictions simply by reason of the identity of their employer or client."[250] They contend that if someone is violating the law, whether criminal or civil, the use of testers or investigators to root out the lawlessness better serves societal interests than limiting the ethical use of deception to those employed by the government.[251] One would be hard-pressed to logically explain why deception serves society only when employed by the government.

After setting the stage, Isbell and Salvi finally confront the ultimate issue of whether attorneys' use of deception through directing testers and investigators to discover lawlessness violates Rules 4.1(a), 5.3(c), 8.4(a), and 8.4(c). The authors acknowledge that "practices that have been longstanding and widespread with respect to undercover investigators generally, and well established though more recent with respect to discrimination testers in particular, appear on their face to involve ethical violations on the part of lawyers directing the activities of the investigators or testers."[252] Notwithstanding the appearance that attorneys could not ethically employ deception, Isbell and Salvi reach the following conclusions: (1) if an attorney acts in a non-representational capacity as a tester or investigator, Rule 4.1(a)'s prohibition on making false statements of material facts to third persons while representing a client would not apply because the attorney would not be representing a client in those circumstances;[253] (2) most notably, Rule 8.4(c)'s prohibition on "dishonesty, fraud, deceit, or misrepresentation would not apply to *misrepresentations of the mild sort* necessarily made by discrimination testers and undercover investigators;"[254] and (3) because Rules 4.1(a) and 8.4(c) are not violated by attorney deception, the derivative claims of vicarious liability for the acts of others contained in Rules 5.3(c) and 8.4(a) do not apply because the deception, if made by an attorney acting in a non-representational capacity as a tester or investigator, would not violate the *Model Rules*.[255] Let's explore the soundness of these conclusions.

249. *Id.* at 804.
250. *Id.* at 805.
251. *See id.* at 805–07.
252. *Id.* at 794.
253. *See id.* at 812–15.
254. *Id.* at 812 (emphasis added).
255. *Id.* at 812, 818–19.

Isbell and Salvi correctly state that Rule 8.4(c)'s prohibition on dishonesty, fraud, deceit, or misrepresentation is not limited to material misrepresentations or when made in a representational capacity—the prohibition applies to attorneys wherever they are and to whatever they are doing.[256] To conclude that attorneys' use of deception when acting as testers or investigators does not violate Rule 8.4(c), however, the authors use an interpretive sleight-of-hand, stating that the rule "applies only to conduct of so grave a character as to call into question the lawyer's fitness to practice law."[257] To reach this conclusion, the authors quote comment 2 to Rule 8.4.[258] This construction is unreasonable for three reasons. First, the plain language of comment 2 shows that its interpretation applies only to Rule 8.4(b), and not 8.4(c). The comment's first sentence states, "Many kinds of illegal conduct reflect adversely on fitness to practice law," which tracks the plain language of Rule 8.4(b) and in no way implicates Rule 8.4(c).[259] The rest of the comment then explores the types of criminal offenses that reflect adversely on an attorney's fitness to practice law. For example, some crimes involve only matters of personal morality, and when an attorney is answerable to the criminal law for those offenses, no ethical violation should be found because those offenses "have no specific connection to fitness for the practice of law."[260] Criminal offenses that are connected to the fitness-to-practice-law question—such that an attorney who commits those offenses should be professionally answerable for them—include fraud, the willful failure to file a tax return, dishonesty, breach of trust, or a pattern of repeated offenses.[261] It would be entirely redundant to include fraud and dishonesty under both Rules 8.4(b) and 8.4(c). A better interpretation is that the *Model Rules* really do not countenance dishonesty, fraud, deceit, or misrepresentation by attorneys. Encouraging attorneys to lie, defraud, deceive, and misrepresent is poor public policy.

The second problem is that such an interpretation necessarily concludes that attorneys may freely and unilaterally decide to lie, defraud, deceive, and misrepresent, so long as the attorney feels that her fitness to practice law will not be jeopardized. I suspect that every attorney in every case involving attorney deception would seek such a liberal interpretation while arguing that the deception served a greater good. Instead of discovering a murky, ill-defined implied investigation deception exception, it would be prudent to adopt an express deception exception instead.

256. *Id.* at 816.
257. *Id.*
258. *Id.* at 816 n.90.
259. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (2007).
260. *Id.*
261. *Id.*

Third, and most importantly, interpreting Rule 8.4(c) to apply only to cases implicating an attorney's fitness to practice law—and necessarily excluding from that realm the use of deception in investigator and tester cases—does not involve any analysis. Instead, this implied exception simply transforms the question—whether attorney deception impacts an attorney's fitness to practice law—into a conclusion that attorney deception does not impact an attorney's fitness to practice law when done in a non-representational capacity while acting as a tester or investigator to uncover lawlessness. The ultimate question simply becomes the ultimate conclusion. The root of Rule 8.4(c)'s prohibition seems to rest on the idea that attorneys should not be liars and cheats.[262] To resolve this issue, the legal profession owes it to society to clearly articulate—after a full and informed debate—if and when attorneys may ethically employ deception. Simply concluding that attorney deception, when employed in certain circumstances, does not impact an attorney's fitness to practice law puts the cart before the horse. If a full and informed debate reaches that conclusion, then the *Model Rules* should be amended to reflect that sentiment, creating an express deception exception.

Notwithstanding their conclusion that attorneys may direct the use of deception by testers and investigators without violating Rules 4.1(a), 5.3(c), 8.4(a), or 8.4(c), Isbell and Salvi caution that the ethical availability of deception is limited.[263] The first exclusion from their implied deception exception is that an attorney cannot ethically direct a tester or investigator to engage in fraud or perjury.[264] The authors reason that because an attorney cannot directly engage in fraud or perjury, then the attorney cannot direct others to do so. Unfortunately, this analysis contradicts, or at least falls short of, their interpretation of Rule 8.4(c) to include only conduct that impacts an attorney's fitness to practice law. The authors simply draw an ethical distinction between mere dishonesty, deceit, or misrepresentation, and fraud or perjury.[265] Without further analysis, however, their conclusion becomes nothing more than a premise. That is, if an attorney may unilaterally decide to lie and deceive, why is that same attorney prohibited from engaging in fraud or perjury if needed to uncover unlawful activity? Thus, an implied investigation exception to attorney deception simply confounds the scope of that exception. Such an ex-

262. Undeniably, certain lies and deceptions seem commonplace in our society. Many parents are routinely challenged by their children on whether lying can be justified—is there a Santa Claus, a Tooth Fairy, or an Easter Bunny? Do babies come from storks? If an attorney lied in response to these questions, those lies would not impact an attorney's fitness to practice law. This is not the essence of the attorney deception issue.

263. *See* Isbell & Salvi, *supra* note 236, at 820–29.

264. *Id.* at 821.

265. *See id.*

ception is not a solution. The solution is to create an express exception after a full and fair debate, which Isbell and Salvi have undoubtedly assisted.

The second exclusion from their implied deception exception makes it unethical for an attorney to use deception if it violates Rule 4.2's prohibition against communicating with persons represented by counsel and Rule 4.4's prohibition against violating the rights of third persons while obtaining evidence.[266] These are troubling conclusions. Isbell and Salvi employ a bright-line interpretation of Rules 4.2 and 4.4 that carves litigation practices out of the deception exception:

> [T]his may mean that [attorneys] may make use of testers only in investigating whether a particular enterprise is engaging in discriminatory practices, and in preparing litigation challenging such practices, but not in gathering further evidence once the litigation has been commenced or announced, and the target of litigation has made known that it is represented by counsel in the matter.[267]

In support of their position, the authors cite a couple of court decisions and ABA opinions which conclude that attorneys cannot ethically use investigators to do what attorneys cannot do—namely, communicate with opposing parties represented by counsel.[268] Unfortunately, these conclusions again demonstrate the difficulty in setting the scope of the deception exception when the exception is implied through interpretation. It is more prudent and efficient to carve out an express deception exception such that the public policy reasons are fully vetted and included in the exception. If a full and open debate on attorney deception results in a consensus that deception in litigation should be unethical, while deception occurring pre-litigation is ethical, then so be it. However, such a distinction appears illogical. So long as an attorney does not engage in the deception—whether pre-litigation or during litigation—then the ethics rules should not hinder a client or third person from lawfully employing deception to root out lawlessness regardless of whether the unlawful activity takes place before, during, or after litigation is underway. Analysis of an express investigation deception exception reveals the contours of the exception.

Isbell and Salvi correctly analyze the applicability of Rule 4.3's restriction on how an attorney may ethically deal with unrepresented

266. *Id.* at 822.

267. *Id.* at 823.

268. *Id.* at 824 (citing United States v. Hammad, 678 F. Supp. 397 (E.D.N.Y. 1987) (holding that prosecutors violated ethics rules where government agents recorded telephone conversations between defendant and witness and where prosecutor knew at the time that defendant had retained counsel); Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. 1990) (concluding that an attorney who used investigators to interview former employees of claimant without determining whether they were represented by counsel violated Rules 4.2 and 4.3); ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 663 (1967) (asserting that an attorney cannot communicate through a private investigator)).

persons through the use of deception by testers and investigators.[269] The authors accurately explain that Rule 4.3 involves a third person's presumed expectations in dealing with an attorney for an opposing party.[270] Thus, an attorney acting in a representational capacity, "but disguising his identity as such in dealing with an unrepresented person can also violate Rule 4.3 because, although he is acting as a[n attorney], he has allowed [the third] person to misunderstand that fact."[271] Because Rule 4.3 only deals with the presumed expectations of third persons when dealing directly with attorneys, however, it should not apply vicariously to an attorney who supervises testers and investigators who employ deception, especially if the tester or investigator is the attorney's client.[272] The authors conclude bluntly and correctly: "No unrepresented person is realistically likely to apply his or her expectations of [attorneys] to an investigator or tester."[273]

Finally, Isbell and Salvi address Rule 4.4's prohibition against obtaining evidence in ways that violate the rights of third persons.[274] They argue that it should remain unethical for an attorney to direct or supervise testers or investigators who violate the legal rights of others through unreasonable searches and seizures, entrapment, invasion of privacy, or unlawful wiretapping.[275] This sound conclusion lies in understanding that an attorney's proper role is to help others comply with, rather than violate, the law. If a deception exception—whether implied or express—allows attorneys to direct testers or investigators to use deception to uncover unlawful activity, it would not make sense to allow unlawful activity to root out unlawful activity. Indeed, two wrongs would not make a right. To be sure, Rule 1.2(d) already prohibits an attorney from assisting in the violation of the law. It would be sheer folly to make an exception to that rule to allow lawlessness under the guise of investigating lawlessness.

With the benefit of the sound starting position provided by the analytical framework described in Part III and the Isbell–Salvi article summarized in section IV.C above, it is important to see how courts have confronted attorney deception on a client's behalf. New York courts considered a disciplinary case against a state-employed attorney who directed a state employee to lie under oath to help catch other state employees suspected of criminal activity. Brian Malone, an attorney serving as Inspector General of the New York State Department of Correctional Services, led an investigation into allegations

269. *See id.* at 825.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 826.
275. *Id.* at 827.

that corrections officers broke the law by brutally beating an inmate.[276] When a corrections officer (CO) came forward to identify the officers involved in the beating, Malone decided that the CO would be subjected to retaliation by his peers for violating the "code of silence" that prohibits corrections officers from reporting on other corrections officers.[277] Malone sought a way to root out the culpable officers while keeping the CO's identity a secret to avoid retribution to the CO for breaking the code of silence.[278] To accomplish this goal, Malone directed the CO to lie under oath when interviewed alongside the alleged offenders.[279] Although the CO lied under oath to hide his identity, Malone had previously interviewed the CO under oath to capture his honest testimony.[280] After unilaterally conducting this ruse, Malone informed the Commissioner of the Department of Correctional Services and its chief legal counsel about the CO's contradictory sworn testimony.[281] Both officials approved of Malone's use of deception.[282] After disciplinary charges were brought against the suspected officers for using undue force, the CO was forced to identify himself and his contradictory sworn testimony.[283] Malone's deception resulted in additional disciplinary charges, but these were not charges against the offending corrections officers. Instead, these were charges that Malone had acted unethically as an attorney in directing the deception.

Based on Malone's instructing the CO to lie under oath, New York's Committee on Professional Standards brought disciplinary charges against Malone for violating New York's equivalent to Rule 8.4(b)–(c) by engaging in "illegal conduct involving moral turpitude," "conduct that adversely reflects on his fitness to practice law," and "conduct involving dishonesty, fraud, deceit, or misrepresentation."[284] A referee issued a bright-line finding that Malone had engaged "in conduct involving deceit and misrepresentation," noting that Malone's justifications for his deception were irrelevant in deciding whether the deception was unethical.[285]

The question of whether Malone acted ethically in directing the CO to engage in deception by lying under oath split the Appellate Division of the New York Supreme Court. In a 3–2 decision, the court held that

276. *In re* Malone, 480 N.Y.S.2d 603, 604 (1984).
277. *See id.*
278. *Id.*
279. *Id.* at 605.
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*

Malone had violated the ethics rules.[286] The court made clear that the deception prohibition does not contain an implied ends-justify-the-means exception.[287] The court explained that the reason for an attorney's unilateral deception does not transform the conduct into ethical behavior, particularly when there are alternatives to the use of deception.[288] In no uncertain terms, the court issued a bright-line interpretation of the ethics rules by holding that there are no implied exceptions that allow attorneys to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.[289] In other words, the court rejected an implied investigation deception exception.

In a dissenting opinion, two justices concluded that not only did Malone act ethically, but he acted admirably to improve the administration of justice.[290] The dissent applauded Malone's deception in advancing the public interest by rooting out a conspiracy among corrupt corrections officers to mistreat inmates, noting that Malone's deception "has not diminished the court's integrity one iota."[291] Borrowing freely from criminal cases admitting evidence obtained through deception, the dissenting opinion concluded that "carefully selected use of [attorney] deception in compelling circumstances" should be sanctioned as supporting the administration of justice and "legitimate law enforcement objectives."[292] Indeed, the dissenting opinion dignified the ends-justify-the-means defense, explaining that Malone's deception caused no harm to the judicial system or society, protected innocent people, rooted out corrupt officials, revealed truth, and advanced the public interest.[293] It concluded that "compelling circumstances" justified Malone's deception."[294] Finally, the dissent cautioned that if attorneys were not authorized to unilaterally decide to engage in deception, "the practical but unwholesome effect . . . may well be the cessation of meaningful investigations of corrupt conduct by similarly engaged lawyers, prosecutors and judges."[295]

286. *Id.* at 607. The court initially rejected Malone's contention that he was not acting as an attorney while engaging in deception:

> Holding a public office, such as Inspector General, is not a shield behind which breaches of professional ethics, otherwise warranting disciplinary action, are permitted. Rather, a lawyer who holds public office must not only fulfill the duties and responsibilities of that office, but must also comply with the Bar's ethical standards.

Id. at 606.

287. *Id.*

288. *Id.* at 606–07.

289. *Id.* at 607.

290. *Id.* at 608–09 (Yesawich, J., dissenting).

291. *Id.* at 608.

292. *Id.*

293. *Id.*

294. *Id.* at 608–09.

295. *Id.* at 609.

A few years before *Malone* was decided, the Illinois Supreme Court issued one of the first decisions addressing the issue of whether attorneys may ethically engage in deception by instructing witnesses to lie in court.[296] While serving in the Cook County State's Attorney's Office as Chief of the Criminal Division, Morton Friedman directed witnesses to lie in court to help catch attorneys who bribed witnesses.[297] In one instance, Friedman instructed a police officer to follow the directions of an attorney who sought to bribe the officer to secure the dismissal of a criminal charge against the attorney's client.[298] Following Friedman's instructions, the officer lied in court, resulting in the dismissal of the criminal charges.[299] After the criminal charges were dismissed and the attorney paid the bribe to the officer, the State Attorney's Office indicted the attorney for bribery.[300] The State Attorney's Office then informed the court of its plan to have the officer lie in court to catch the bribing attorney.[301] In another instance, Friedman instructed a police officer to lie in court to aid the dismissal of criminal battery charges against an attorney's client in exchange for a bribe.[302] After the officer's false in-court testimony resulted in the charges being dropped, the bribing attorney paid the lying officer.[303] The State Attorney's Office informed the court of the officer's lies immediately after the dismissal of the criminal charges, which were later reinstated.[304]

This straightforward use of deception confounded the Illinois Attorney Registration and Disciplinary Commission. The Commission's Administrator brought ethical charges against Friedman for soliciting false testimony in court to catch bribing attorneys.[305] The Administrator claimed that Friedman violated Illinois's equivalents to Rules 3.3, 3.4, and 8.4(c) by creating false evidence, knowingly using false evidence, secreting a witness, and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[306] However, the Commission's Hearing Board decided that Friedman's deception had not violated any ethics rules.[307] The Administrator sought review of that decision by the Commission's nine-member Review Board.[308] Upon initial review by five members, three board members recommended

296. *In re* Friedman, 392 N.E.2d 1333, 1334 (Ill. 1979).
297. *Id.* at 1333–34.
298. *Id.*
299. *Id.* at 1334.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 1333.
306. *Id.*
307. *Id.*
308. *Id.*

that Friedman be censured for his unethical misconduct, while two members recommended affirming the Hearing Board's decision that Friedman had not violated any ethics rules.[309] Following a second review, however, a five-member majority recommended that Friedman be censured for his ethical violations, while three members dissented.[310]

The disciplinary case found its way to the Illinois Supreme Court, where unanimity was also elusive.[311] The deception issue fractured the court, with four of the six participating justices writing separately. Ultimately, the court decided to dismiss the ethical charges against Friedman.[312] To reach that result, however, even the four-justice majority split, with two justices deciding that Friedman had violated the ethics rules[313] and two justices deciding that Friedman had not violated the ethics rules.[314] Two justices issued dissenting opinions, voicing their disapproval of dismissing the ethical charges against Friedman.[315] In total, four justices concluded that Friedman had acted unethically, but four also decided that Friedman should not be disciplined for his deception.

Friedman's argument, at its core, was that he did not act unethically because his deceptive investigative methods, like "court-tolerated deceit employed in narcotics investigations," were necessary to catch corrupt attorneys.[316] Friedman contended that his "lofty motive negate[d] any technical violation" of the ethics rules.[317] The Administrator, on the other hand, argued that attorneys do not have unilateral discretion to employ "deceit and deception . . . to mislead or deceive a court."[318] The Administrator further argued that an attorney's motive to engage in deception does not shield the attorney from his ethical responsibility to be honest.[319]

In a 4–2 decision, the court held "that no sanction should be imposed" against Friedman, because he had "acted without the guidance of precedent or settled opinion and because there is apparently considerable belief (as evidenced by the letters and affidavit supporting

309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.* at 1336.
313. *Id.* at 1333–36 (Goldenhersh, C.J., delivering the court's decision, with Kluczynski, J., joining the decision and opinion).
314. *Id.* at 1336–39 (Underwood, J., concurring) (Ryan, J., joined the concurring opinion, also finding no ethical violation and agreeing with the decision not to discipline Friedman).
315. *Id.* at 1339–42 (Clark, J., dissenting); *id.* at 1342–43 (Moran, J., dissenting).
316. *Id.* at 1334.
317. *Id.* at 1334–35.
318. *Id.* at 1335.
319. *Id.*

[him]) that he acted properly in conducting the investigations."[320] Yet, the justices were far from unanimous in their approaches to the case.

The first of the four opinions, written by Chief Justice Goldenhersh and announcing the opinion of the court, concluded that Friedman had violated his ethical duties but decided that discipline was not warranted.[321] Chief Justice Goldenhersh stated that it was "apparent" that Friedman had "deviated" from the rules prohibiting an attorney from creating and using false evidence, secreting a witness, and engaging in conduct involving dishonesty and deception.[322] Although Friedman maintained that his argument was not "that the end justifies the means," Chief Justice Goldenhersh thought otherwise and found Friedman's argument unacceptable because "[t]he integrity of the courtroom is so vital to the health of our legal system that no violation of that integrity, no matter what its motivation, can be condoned or ignored."[323] Taking aim at Friedman's "contention that no alternative methods were available to ensure the successful prosecution of corrupt attorneys," Chief Justice Goldenhersh wrote that "even if no other ways existed to ferret out bribery, [Friedman] would still not be privileged to engage in unethical (and perhaps illegal) conduct."[324] Chief Justice Goldenhersh rejected the notion that the *Model Rules* contained an implied investigation deception exception.[325]

Agreeing that Friedman should receive no discipline, the other two justices—rounding out the four-justice majority dismissing the ethical charges against Friedman—concluded that Friedman had not violated his ethical duties in the least.[326] Justice Underwood, who penned a concurring opinion, recited a long list of supporters who concluded that Friedman had not violated any ethics rules by engaging in deception.[327] Justice Underwood cited and quoted at length legal authorities such as the Chief of the Criminal Justice Division of the Illinois Attorney General's Office, federal and state judges, federal and state prosecutors, the Governor of Illinois, law school professors, and criminal defense attorneys.[328] One ethics expert testified that Friedman did not violate any ethics rules because his deception was rooted in a pure motive, one that sought "to improve the administration of crimi-

320. *Id.* at 1336.
321. *Id.* at 1333–36.
322. *Id.* at 1335.
323. *Id.*
324. *Id.* at 1336.
325. *See id*. at 1335 (stating that Friedman had violated ethics rules without examining whether exceptions applied).
326. *Id.* at 1336–39 (Underwood, J., concurring).
327. *Id.* at 1336.
328. *Id.*

nal justice."[329] Indeed, Justice Underwood did more than simply conclude that Friedman had not violated any ethics rules. He applauded Friedman's conduct to independently engage in deception in court proceedings: "[T]here is no doubt [that Friedman] believed his own conduct necessary to avoid a greater injury—the continued corruption of the judicial process by the two attorneys. That belief was, in my judgment, not only reasonable—it was correct."[330] Finally, although Justice Underwood casually mentioned that he "abhor[s] the thought of intentionally deceiving a judge—even temporarily—by the presentation of false testimony," he also explained that he "abhor[s] even more those members of my profession who seek to prostitute our courts" by bribing witnesses.[331] Because Friedman "was a conscientious prosecutor dedicated to improving the administration of criminal justice" through the use of deception, Justice Underwood voted to dismiss the ethical charges against him.[332] Justice Underwood unquestionably viewed Friedman as an ethics hero, not an unethical villain.

Two justices did not share Justice Underwood's unbridled and enthusiastic praise for Friedman's conduct. Justice Clark was unforgiving and blunt in his assessment:

> Lawyers who cause or permit lies to be told to judges are guilty of conduct which tends to defeat the administration of justice, regardless of the motive of the lawyer and regardless of the immediate impact of the lie. That [Friedman's] sole apparent motive was to obtain evidence which he considered essential to the effective prosecution of corrupt attorneys therefore is not dispositive . . . It is not within the province of any attorney, including one who represents the State, to determine whether the public interest requires the temporary deception of the court. . . . At the very least, therefore, I find [Friedman] guilty of incredibly poor ethical judgment and deserving of censure.[333]

Evincing an understanding of the difficulty in prosecuting corrupt attorneys without actually allowing them to engage in bribery of police officers, Justice Clark nonetheless condemned Friedman's decision "to confront the court, after the fact, with the completed deception, stating in effect: 'I did it. I'm proud of it. What are you going to do about it?'"[334] In the final calculation, Justice Clark concluded that Friedman's intentional deception of the courts could not withstand ethical scrutiny and decided that Friedman had unethically "usurped the role of the courts through deceiving a trial judge."[335]

329. *Id.* at 1336–37 (referencing STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 1.4 (1971)).

330. *Id.* at 1339.

331. *Id.*

332. *Id.*

333. *Id.* at 1340 (Clark, J., dissenting).

334. *Id.* at 1341.

335. *Id.* at 1342.

In the final written opinion, Justice Moran declared that he was "diametrically opposed" to Justice Underwood's opinion because it "not only condones [Friedman]'s conduct but also lauds him for it and encourages it in others," all under the inescapable conclusion "that the end justifies the means."[336] Such a conclusion, according to Justice Moran, "sets an intolerably dangerous precedent."[337] Condemning Friedman's behavior, Justice Moran stressed the important role of attorney ethics in our legal system:

> [Friedman's] conduct is of the genre which has undermined the public's confidence in the profession, in the courts and, ultimately, in the law. If the public finds it intolerable that a member of the profession can operate without the constraints of law, it can be no less intolerable to the court affronted by the conduct. The court must remain the ultimate forum of truth. [Friedman's] conduct has disregarded that essential, and, in so critical a consideration, I do not believe that the court can condemn the act but excuse the actor.[338]

In no uncertain terms, Justice Moran rejected the "pure motive" defense:

> [T]he public, the court and the profession have the right, minimally, to expect a valid, common-sense determination by the practitioner to discern right from wrong, and one need not be trained in the law to know that it is flatly unacceptable to prevaricate to or mislead the court or to be instrumental in encouraging others to do so.[339]

Justice Moran's bright-line approach holds attorneys to the highest ethical standards of truthfulness and honesty to maintain the public's trust in the legal profession.

The Philadelphia Bar Association's Professional Guidance Committee addressed attorney deception by issuing an advisory opinion on whether an attorney who is representing a client in litigation may

336. *Id.* at 1342–43 (Moran, J., dissenting).

337. *Id.* at 1342.

338. *Id.* at 1343. This opinion reminds me of Justice Brandeis's cautionary tale in his famous dissent in *Olmstead v. United States*:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *see also* Attorney Grievance Comm'n of Md. v. Garcia, 979 A.2d 146, 154 (Md. 2009) ("We have recognized that public confidence in the legal profession is a critical facet to the proper administration of justice.").

339. *Friedman*, 392 N.E.2d at 1342.

ethically direct a third person to use deception to gain access as a "friend" to the MySpace or Facebook pages of an unrepresented, adverse, non-party witness who the attorney had deposed in the case.[340] The attorney wanted to gather information from the witness's social networking pages that could be used to impeach the witness's testimony.[341] Although the attorney did not want the investigator to lie to the witness to gain access to the websites, the attorney wanted to conceal the investigator's true identity and purpose by hiding his affiliation with the attorney and "the true purpose for which [the investigator sought] access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness."[342]

The Committee deflected the question of whether the attorney could use a non-attorney third person to avoid ethical issues. Citing Pennsylvania's equivalents to Rules 5.3(c)(1) and 8.4(a), the Committee found that the attorney was ethically responsible for the conduct of the third person as though the attorney were engaging in that behavior himself.[343] Thus, the ultimate question of whether an attorney may ethically engage in deception had to be resolved on the merits, regardless of whether the attorney engaged in the deception or directed a third person to do so.[344]

The Committee concluded that the deception was unethical for two reasons.[345] First, the Committee decided that the conduct would violate Rule 8.4(c)'s prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation, because the purpose of the conduct was to deceptively induce the witness to allow access to her websites without disclosing that the true purpose for the access was to obtain impeachable information.[346] In bright-line fashion the Committee declared, "Deception is deception."[347] The second reason for deeming the conduct unethical was that it would violate Rule 4.1(a)'s prohibition that attorneys, while representing clients, cannot make false statements of material facts to third persons.[348]

In providing clear-cut guidance that an attorney's use of deception is unethical, the Committee realized that it was not providing its opinion in a vacuum. Indeed, the Committee made clear that it was "aware that there is controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might

340. Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009).
341. *Id.* at 1.
342. *Id.*
343. *Id.* at 2–3.
344. *Id.* at 3–6.
345. *Id.* at 3–4.
346. *Id.* at 3.
347. *Id.*
348. *Id.* at 4.

be thought to be deceitful."[349] Specifically, the Committee referenced various positions on the issue of attorney deception.[350] First, the Committee noted that the New York Lawyers' Association Committee on Professional Ethics had "approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated."[351] Second, the Committee acknowledged that two state supreme courts—Colorado and Oregon—applied bright-line interpretations to conclude that the *Model Rules* did not contain implied exceptions for attorney deception.[352] Finally, the Committee commented that two states—Oregon and Iowa—have explicitly carved out exceptions to their *Model Rules* to allow attorneys to engage in deception in limited circumstances.[353]

The issues confronted by the courts in *Malone* and *Friedman* and by the Philadelphia Bar contain no easy solution for a democratic society that demands fairness in its judicial system. On the one hand, authorizing dishonesty and deception by attorneys to root out dishonesty and deception within that system may not engender public trust and confidence.[354] On the other hand, allowing unlawful activity to go unchecked because of attorney ethics rules is not appealing.[355] Some participants in the debate have obviously concluded that the deception employed by Malone and Friedman was required to expose evil. Perhaps lying beneath the surface in both cases is the sentiment that alternatives existed to the attorney's unilateral choice to use deception

349. *Id.*
350. *Id.* at 4–6.
351. *Id.* at 4 (citing N.Y. Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 737 (2007)).
352. *Id.* at 5–6 (citing People v. Pautler, 47 P.3d 1175 (Colo. 2002); *In re* Gatti, 8 P.3d 966 (Or. 2000)).
353. *Id.* (citing OR. RULES OF PROF'L CONDUCT R. 8.4 (2009); IOWA RULES OF PROF'L CONDUCT R. 8.4 (2005)).
354. *See, e.g.*, Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 694–96, 699–700 (8th Cir. 2003) (holding that attorneys violated Rule 8.4(c) by directing an investigator to use deception to interview the opposing party "under false and misleading pretenses" by posing as a customer to acquire information for ongoing litigation concerning a franchise dispute, particularly because that "information that could have been obtained properly through the use of formal discovery techniques" without "resorting to self-help remedies that violate the ethical rules").
355. *See, e.g.*, Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002) (holding that an attorney's use of testers before and after the filing of a race discrimination class action to obtain videotape evidence of discrimination did not violate Rules 4.2 and 4.3 because, although attorneys and their investigators "cannot trick protected employees into doing things or saying things they otherwise would not do or say," attorneys "can employ persons to play the role of customers seeking services on the same basis as the general public" and "can videotape protected employees going about their activities in what those employees believe is the normal course").

to uncover unlawful activity. If there are alternative ways to uncover unlawful activity, then the debate should be tamped down, and not authorizing an attorney to employ deception might be palatable to both sides. For example, it was implied in the Philadelphia Bar's opinion that if the witness's Facebook or MySpace pages contained information that contradicted her sworn testimony and that information could not be obtained through other means, then a party to a lawsuit would have no way of countering false testimony. It seems apparent, however, that the attorney could have employed judicial measures to obtain the information without resorting to deception. But if there were no alternatives to capturing the information to impeach the witness's sworn testimony other than through the otherwise lawful deception by a non-attorney third person, then it seems to be bad policy to use attorney ethics rules to forbid a non-attorney from doing something that no other law prohibits. If indeed there are no alternatives, however, such that the unlawful actors will go undetected and unpunished without attorney deception, then perhaps there is a perfect stalemate—requiring a choice between two evils. This is the real fulcrum of the attorney deception debate.

Society is listening for our answer as to the scope of any deception exception. My express investigation deception exception defines the scope and governs the types of scenarios found in *Malone*, *Friedman*, and before the Philadelphia Bar in a reasonable manner. To ensure that the legal profession carries the banner of utmost honesty to foster trust and support for the administration of justice and the rule of law, I agree with the court in *Malone* and four of the justices in *Friedman* who condemned attorney deception. Once attorneys use the legal profession and the courts as breeding grounds for deception, the search for truth is ultimately undermined. And, the slippery slope of an ends-justify-the-means exception leads to further mistrust. This cycle of deeper distrust of the legal profession and the justice system would risk spinning downward rather than upward. In a phrase, the public should be conditioned to believe that attorneys are honest and fair rather than dishonest and deceptive.

The Supreme Court of Wisconsin, on the other hand, authorized the use of deception by an attorney. In *Office of Lawyer Regulation v. Hurley*,[356] an attorney named Stephen Hurley was accused of violating the Wisconsin equivalents to Rules 4.1(a) and 8.4(c) by making a false statement of material fact and employing deception when he hired an investigator to help a criminal defendant's case.[357] Hurley represented a criminal defendant in a case alleging, among other

356. Office of Lawyer Regulation v. Stephen P. Hurley, No. 2007AP478-D (Wis. Feb. 11, 2009), *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/6211/Office%20of%20Lawyer%20Regulation%20v.%20Hurley.pdf.

357. *Id.* at 2–3.

things, the possession of child pornography and exposing a child to those harmful materials.[358] Believing that the alleged victim was lying, Hurley hired an investigator to use deception to obtain the victim's personal computer to show that the victim freely viewed pornography.[359] Using the ruse of an owner of a computer company who was giving away free computers, the investigator was able to obtain the suspect's computer, which contained pornography.[360] Responding to the resulting ethics charges, the Wisconsin Supreme Court concluded that Hurley had not violated any ethics rules—derivative or otherwise—because an implied deception exception existed in Wisconsin.[361] The court quoted the ethics referee to show that "there was a widespread belief in the Wisconsin Bar that the type of conduct engaged in by Attorney Hurley was and is acceptable."[362] The court noted that "prosecutors frequently supervise a variety of undercover activities and sting operations carried out by nonlawyers who use deception to collect evidence, including misrepresentations as to identity and purpose."[363] Explaining that there is no authority for the proposition that prosecutors can employ deception while private attorneys cannot, the court dismissed the ethics charges against Hurley.[364]

Although I disagree with the Wisconsin Supreme Court's discovery of an implied deception exception in the *Model Rules*, I agree with the court that certain undercover operations require deception to expose lawlessness. Almost all of the cases discussed so far demonstrate that it can be exceedingly difficult for evidence of wrongdoing to be discovered without some sort of undercover operation that necessarily employs a form of deception. From undercover criminal investigations to discrimination testers to enforcers of intellectual property rights, deception is often needed to discover unlawful activity. Courts have long approved and repeatedly sanctioned the use of deception by testers in discrimination cases.[365] As alluded to above, testers disguise their true purpose and identity—whether to secure housing, apply for a job, or seek to use goods or services—to collect evidence of unlawful practices of discrimination based on such classifications as race, gender, or disability.[366] The use of testers is arguably required because it is

358. *Id.* at 2.
359. *Id.*
360. *Id.* at 2–3.
361. *Id.* at 3–4.
362. *Id.* at 4.
363. *Id.*
364. *Id.*
365. *See, e.g.*, Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983); Wharton v. Knefel, 562 F.2d 550, 554 n.18 (8th Cir. 1977).
366. *See generally* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (examining whether persons posing as "testers" had standing to sue under the Fair Housing Act).

often difficult, and perhaps inefficient or impossible, to uncover intentional discrimination by waiting for victims to be identified.[367] Indeed, employing deception in these situations seems justified, beacause the effects of discrimination are not felt by actual victims. This idea is not unlike investigators' use of deception to catch online pedophiles—society has determined that it is better to catch the pedophile before there is a damaged victim. Indeed, the evidence of discrimination that testers provide is often more than simply useful—it is invaluable and indispensable. The United States Court of Appeals for the Seventh Circuit has explained that, although it is "regrettable that [housing] testers must mislead commercial landlords and home owners as to their real intentions to rent or buy housing," the practical "requirement of deception [is] a relatively small price to pay to defeat racial discrimination. The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination."[368]

Monroe H. Freedman has "concluded that there are circumstances in which a lawyer can ethically make a false statement of fact to a tribunal [in violation of Rule 3.3(a)(1)], can ethically make a false statement of material fact to a third person [in violation of Rule 4.1(a)], and can ethically engage in conduct involving dishonesty, fraud, deceit, or misrepresentation [in violation of Rule 8.4(c)]" based on considerations of "'a larger legal context shaping the lawyer's role,'" "inconsistent ethical rules in the light of reason," and "moral philosophy."[369] Freedman's first two conclusions—that attorneys may lie to judges by stating that criminal defendants are innocent[370] and may deceive third persons in negotiations[371]—do not further my

367. *See generally Richardson*, 712 F.2d at 321 (discussing the valuable contributions testers make in rooting out discrimination and in defeating false claims).

368. *Id.*

369. Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 781–82 (2006) (quoting MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 14 (2004)).

370. Freedman concluded that criminal defense attorneys may ethically tell a judge that a client is innocent even if that is a lie, but this conclusion is mostly supported through an analysis that the judge does not have any right to ask about a criminal defendant's innocence. *Id.* at 773–77. There can be no doubt that the attorney could avoid lying altogether simply by ensuring that there absolutely is no proper role for the court in asking whether a criminal defendant is innocent, rather than not guilty beyond a reasonable doubt.

371. Freedman concluded that attorneys may ethically "deceive" third parties and judges during negotiations. *Id.* at 778–80. This conclusion actually does not support an endorsement of lying or deceiving in negotiations. Instead, Freedman seems to agree with the *Model Rules* in carving out an area in negotiations where each party should be on guard against statements that cannot be deemed material and/or factual. *Id.* at 778; *see also* MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2007) (discussing "generally accepted conventions" in the course of negoti-

analysis of attorney deception. However, it is helpful to discuss Freedman's argument to authorize dishonesty and deception in sting operations.[372] Freedman shares a personal story from the 1960s in which he helped expose racial discrimination in housing by using testers in the District of Columbia.[373] Freedman relates that the only way to prove racial discrimination against landlords was by employing testers who would deceptively pose as housing applicants with no interest in buying or renting, but rather with the sole interest of suing the landlord for racial discrimination if the landlord appeared to discriminate based on race.[374] Explaining that it was unethical for an attorney to engage in dishonesty, deceit, fraud, or misrepresentation, Freedman also admitted that he technically violated ethics rules by acting through the testers.[375] Every case where an attorney directs another person to employ deception necessarily implicates the derivative ethical duty not to direct someone else to engage in conduct that the attorney may not ethically perform himself. Yet, Freedman's story demonstrates the importance of authorizing attorneys to direct third persons to engage in lawful deception to eradicate the harmful societal effects of intentional, unlawful discrimination.

My express investigation deception exception, contained in Part VI below, directly condones Freedman's direction of discrimination testers to use deception. The State Bar of Arizona also supports this type of investigation deception exception, albeit as an implied exception. A formal opinion concluded that "the use of 'testers' who employ some deceit is proper under the ethical rules to protect society from discrimination based upon disability, race, age, national origin, and gender," even in the face of Arizona's equivalent to Rule 8.4(c)'s prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation.[376] Relying on the Isbell–Salvi article, the opinion stated that the deception prohibition should not act as a shield to hide unlawful discrimination when the otherwise "legitimate conduct" of using deception is available to discover the discrimination.[377]

Undercover criminal informants also play a valuable role in society. Over a half-century ago, the United States Court of Appeals for the Second Circuit explained, "Courts have countenanced the use of informers from time immemorial; . . . it is usually necessary to rely upon [informers] or upon accomplices because the criminals will almost certainly proceed covertly. Entrapment excluded, . . . decoys and

ations that certain statements should not be taken as statements of material fact, such as those regarding the value of a transaction or settlement).

372. Freedman, *supra* note 369, at 780–81.
373. *Id.* at 780.
374. *Id.*
375. *Id.*
376. State Bar of Az. Op. 99-11 (1999).
377. *Id.*

other deception are always permissible."[378] There has evolved a popular saying describing the importance of the use of informants to law enforcement's investigative efforts: "Good informant, good case. Bad informant, bad case. No informant, no case."[379] It would make little sense to hinder criminal investigations by applying attorney ethics rules to inhibit otherwise lawful investigatory conduct. This belief was echoed by Justice Burgess of the Supreme Court of Vermont when he lamented that "the judicial branch, through an ethical rule, might unconstitutionally interfere with valid, and even statutory, executive branch functions directed by attorneys supervising undercover discrimination, consumer fraud, and criminal investigations that require surreptitious taping and deceptive impersonations, including those authorized by warrant."[380]

Notwithstanding the widespread use of informants, testers, and other investigators, some commentators have fairly criticized the use of informants as looking "like a game without rules, in which everything is negotiable and no law is sacrosanct."[381] Arguably, the use of secret undercover informants can engender distrust among the public for law enforcement activities.[382] For example, if the public perceives the use of secret informants as directed only at the poor, the uneducated, and at drug criminals, while giving a pass to the rich, the educated, and to most white-collar criminals, then the power behind using secret informants could do more societal harm than good.[383] These cautionary tales must be addressed to ensure that the authorized use of deception by attorneys does more good than harm. However, these unintended consequences actually speak to execution rather than permission. A full and open debate should air all of these concerns as to the proper scope of a deception exception. As long as attorneys do not personally employ deception, the larger debate over the use of decep-

378. United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950).

379. *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 29 (2009) (quoting an "old law enforcement saying"); *see also Statement for the Record, Before the Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security, and Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 110th Cong. 4 (2007) (statement of Ronald E. Brooks, President, National Narcotic Officers' Association Coalition), *available at* http://judiciary.house.gov/hearings/July2007/Brooks070719.pdf (discussing the necessity of using confidential informants).

380. *In re* PRB, 989 A.2d 523, 531–32 (Vt. 2009) (Burgess, J., concurring).

381. *See, e.g.*, NATAPOFF, *supra* note 379, at 45 (describing a system with flexible legal parameters controlling the government's use of informants); *id.* at 67 (contending that the law surrounding the use of informants is discretionary, laissez-faire, case-by-case, and mostly unregulated by the judiciary or legislative bodies).

382. *See id.* at 125–31.

383. *See id.* at 140 (maintaining that poor and vulnerable suspects are part of an informant system that is less regulated and transparent than that of the white-collar criminal area).

tion is generally better left to the democratic process rather than to the legal profession.

The New York County Lawyers' Association Committee on Professional Ethics issued a very narrow opinion that supports the use of attorney deception in limited circumstances to root out lawlessness.[384] Specifically, the opinion concludes that non-government attorneys may ethically supervise non-attorney investigators using deception when "the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently," or the deception is expressly authorized by law.[385] Restricting the situations in which deception is authorized, the opinion also requires that "the evidence sought is not reasonably available through other lawful means," the conduct of the supervising attorney and the investigator does not violate other provisions of attorney ethics rules or applicable law, the deception does not unlawfully or unethically violate the rights of third parties, and the investigator does not elicit information protected by the attorney–client privilege.[386] This is an inherently reasonable opinion. As such, my proposed investigation deception exception tracks this opinion's approach to attorney deception.

The United States District Court for the Southern District of New York cogently explained why attorney ethics rules should not undermine the vital undercover work needed to enforce legal rights:

> These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover [investigator] posing as a member of the general public engaging in ordinary business transactions with the target. To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general.[387]

The court further explained that enforcing "trademark laws to prevent consumer confusion is an important policy objective," to which reliable reports from "undercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof."[388] This area of protecting intellectual property rights—which should be no less important than enforcing criminal laws or civil anti-discrimination laws—appears to be ripe for deception, and a consensus is developing which condones such conduct. If society deems it beneficial to allow deception as part of an investigation of whether intellectual property rights—patents, trademarks or copyrights—are being infringed, then

384. N.Y. County Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. No. 737 (2007), *available at* http://www.nycla.org/siteFiles/Publications/Publications519_0.pdf.
385. *Id.* at 5.
386. *Id.* at 5–6.
387. Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 122 (S.D.N.Y. 1999).
388. *Id.* at 124.

the primary ethical issue becomes whether attorneys may personally engage in the deception or only direct non-attorneys to use deception.

A leading case that seeks to explain why deception might be required to uncover unlawful infringement of intellectual property rights is *Apple Corps Ltd. v. International Collectors Society*.[389] In *Apple Corps*, a group of plaintiffs, including Yoko Ono Lennon and the owners of the rights to the names and likenesses of Paul McCartney and the legendary rock band the Beatles, sought to enforce a consent order that precluded the defendant from marketing and selling various stamps bearing the images of Yoko Ono or the Beatles.[390] While negotiating licenses with the attorney for the defendant, the plaintiffs' attorney learned that the defendant was still selling the stamps in violation of the consent order.[391] The plaintiffs' attorney contacted the defendant's attorney, who assured him that the defendant would cease marketing and selling the stamps.[392]

Notwithstanding those assurances, the plaintiffs' attorney decided to investigate whether the defendant was still selling the stamps in violation of the consent order.[393] The plaintiffs' attorney called a customer-service representative of the defendant and ordered stamps that were prohibited from being sold under the consent order.[394] The plaintiffs' attorney admittedly engaged in deception by not divulging that she was actually an attorney who represented the plaintiff against the defendant and by misrepresenting that she was simply purchasing stamps for a John Lennon fan.[395] The plaintiffs' attorney also instructed others to engage in the same deception to further investigate whether the defendant was violating the consent order. The plaintiffs' attorney directed her secretary, a stepson of another plaintiff's attorney, an associate attorney for the firm representing one of the plaintiffs, and five members of a private investigation firm to call the defendant's customer-service number to purchase stamps in violation of the consent order.[396] All of these individuals used deception by not revealing their true identity or real purpose in making the calls and ordering the stamps.[397]

Based on the results of the investigation, the plaintiffs' attorney sued the defendant to enforce the consent order and hold the defendant in contempt for violating the order.[398] The defendants countered

389. 15 F. Supp. 2d 456 (D.N.J. 1998).
390. *Id.* at 458–60.
391. *Id.* at 461–62.
392. *Id.* at 461.
393. *Id.* at 462.
394. *Id.*
395. *Id.*
396. *Id.* at 462–64 & n.8.
397. *Id.* at 462–64.
398. *Id.* at 458–69.

with accusations that the plaintiffs' attorney acted unethically by speaking to the defendant's employees without the consent of the defendant's attorney and by deceiving the employees by not revealing that they were attorneys or people being directed by attorneys.[399] The defendants claimed that the plaintiffs' attorney violated New Jersey's equivalents to the following Model Rules: Rule 4.2's prohibition of an attorney from communicating with a person who is represented by an attorney; Rule 8.4(c)'s prohibition of an attorney from engaging in dishonesty, fraud, deceit, or misrepresentation; and Rule 4.3's restriction on how an attorney may ethically communicate with a person not represented by an attorney.[400]

The United States District Court for the District of New Jersey held that the plaintiffs' attorney did not violate the ethics rules in conducting her investigation into whether the defendant was violating the consent order by selling the stamps.[401] The court concluded that there was no violation of Rule 4.2, noting that the "investigators did not ask any substantive questions other than whether they could order the [prohibited] [s]tamps" and only lied about their "purpose in calling and their identities" by posing as normal consumers.[402] The court held that Rule 4.2 does not apply when attorneys or "their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation."[403] The court also determined that applying Rule 4.2 to prohibit these types of factual investigations "would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule."[404]

The court next held that, although Rule 8.4(c)'s prohibition of dishonesty, fraud, deceit, or misrepresentation applied to attorneys whether or not they were acting as attorneys, the Rule "does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes."[405] For support of this implied investigation exception to attorney deception, the court noted that "[u]ndercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing," and that courts and ethics committees have not condemned as unethical the "limited use of deception, to learn about ongoing acts of

399. *Id.* at 472.
400. *Id.*
401. *Id.* at 473–76.
402. *Id.* at 474.
403. *Id.* at 474–75.
404. *Id.* at 475.
405. *Id.* (citing Isbell & Salvi, *supra* note 236, at 812, 816–18).

wrongdoing."[406] In a broad stroke, the court proclaimed, "The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means."[407] Analogizing the attorney's conduct to the deceptive conduct employed by discrimination testers, the court claimed that the only way to ensure that the defendants were complying with the consent order was by calling the defendant directly to purchase the stamps without the caller's concealing her true identity and purpose.[408] The court also applied a tortured construction of Rule 8.4(c) by holding that the rule does not literally mean that attorneys cannot engage in any misrepresentations, but rather only misrepresentations that involve "grave misconduct" that "raises questions as to a person's fitness to be a lawyer."[409] The court then openly created an implied investigation exception to fit its interpretation of Rule 8.4(c): "Investigators and testers, however, do not engage in misrepresentations of the grave character implied by the other words in the phrase [dishonesty, fraud, deceit] but, on the contrary, do no more than conceal their identity or purpose to the extent necessary to gather evidence."[410]

Finally, the court determined that the plaintiff's attorney did not violate Rule 4.3, which prohibits an attorney, while representing a client, from implying that the attorney is disinterested when dealing with an unrepresented person.[411] The court concluded that Rule 4.3 only applies to attorneys acting as attorneys, and the purpose behind the rule was to prevent attorneys from concealing their roles as attorneys to take advantage of unrepresented persons.[412] Deciding that the plaintiff's attorney and her investigators were not acting in their capacity as attorneys, but were simply engaged in "straightforward transactions undertaken solely to determine" and investigate whether the defendant was acting in contempt of the consent order, the court held that Rule 4.3 did not limit the deceptive conduct of the plaintiff's attorney.[413]

406. *Id.*
407. *Id.*
408. *See id.* at 475–76.
409. *Id.* (quoting Isbell & Salvi, *supra* note 236, at 817).
410. *Id.* at 476 (quoting Isbell & Salvi, *supra* note 236, at 817) (alterations in original).
411. *See id.*
412. *See id.*
413. *Id.*; *see* Cartier v. Symbolix, Inc., 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005) (citing *Apple Corps* to announce that the "prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means") (internal citation omitted); *see also* Ala. State Bar Disciplinary Comm., Op. RO-2007-05, at 5 (2007) (adopting the holding of *Apple Corps* and opining that "in the pre-litigation con-

Although the soundness of the court's logic seems inescapable—that a wrongdoer ordinarily cannot protest when his lawlessness is discovered—the attorney's engagement in the deception herself seems questionable. A more ethically sound approach would have the attorney direct or supervise a client or investigator undertaking the deceptive investigation. By separating the attorney from the deception, the legal profession can maintain trust and confidence that attorneys do not personally manipulate the legal system or evidentiary matters, but simply take the facts as they come, whether from clients or investigators.[414]

In a similar vein, Alabama issued an ethics opinion that concludes that an attorney does not violate the ethical prohibition against communicating with a represented person when the attorney directs an investigator to misrepresent himself as a customer to see if the plaintiff lied about his injuries.[415] This implied investigation deception exception authorizes an attorney to direct someone else to engage in conduct that the attorney ethically may not do himself. The foundation of this authorization is that attorney ethics rules should not prohibit a non-attorney from conducting an otherwise lawful investigation into unlawful activity. This is the best approach, but only when crafted as an express investigation deception exception.

D. I'm Not Your Attorney, I'm a Secret Informant: Deception by Attorneys Acting in a Non-Representational, Non-Attorney Capacity

At this point in the Article, the issue of attorney deception has been fully vetted. You likely have staked a position in the debate about whether, and to what extent, attorneys should be permitted to ethically employ deception. The last issue to be addressed concerns deception employed by licensed attorneys who do not practice law. The District of Columbia Bar Legal Ethics Committee demonstrated that high stakes can be involved in resolving the issue of whether an attorney may ethically engage in deception when acting in a non-rep-

text a private lawyer may use an undercover investigator to investigate possible infringement of intellectual property rights posing as customers under the pretext of seeking services of the suspected infringers and may misrepresent their identity and purpose as long as their contact with suspected infringers occur in the same manner and on the same basis as those of a member of the general public seeking such services").

414. This practice would also save the attorney from answering to Rule 3.7's prohibition on an attorney acting as both an advocate and a witness at trial.

415. Ala. State Bar Disciplinary Comm., Op. RO-89-31 (1989); *see also* Will Hill Tankersley & Conrad Anderson IV, *Fishing with Dynamite: How Lawyers Can Avoid Needless Problems from "Pretextual Calling,"* 69 ALA. LAW. 182 (May 2008) (favoring the use of an investigator to avoid issues with Rule 3.7).

resentational capacity.[416] The Committee was asked "whether attorneys who are employed by a national intelligence agency violate [Rule 8.4(c)] if they engage in fraud, deceit, or misrepresentation in the course of their non-representational official duties."[417] The Committee answered in the negative but also attempted to narrow the scope of its implied deception exception for intelligence officials. The Committee concluded that so long as an attorney is employed by a government agency, acts in a non-representational official capacity in the scope of his employment, and reasonably believes that he is authorized by law to engage in deception, then Rule 8.4(c)'s deception prohibition does not apply.[418] The Committee reasoned that some federal employees must use deception to carry out their official duties. For example, employees of the Central Intelligence Agency may be required to work in a clandestine fashion and lie about their identity, employment status, or even fidelity to the United States.[419]

As shown above, the issue of whether an attorney may ethically engage in deception when not acting in a representational capacity without violating Rule 8.4(c) may be addressed through an implied investigation deception exception. The problem with this approach is that attorneys may be unable to understand the scope of that permissive authority without an express, well-defined investigation deception exception. The express investigation deception exception proposed by this Article alleviates ambiguity and eases the interpretational burden imposed upon non-representational attorneys seeking to use deception as part of their official duties. Because it is reasonable to authorize a non-attorney to engage in deception during a lawful investigation to uncover unlawful activity, it should not matter if the investigator happens to be licensed to practice law. That is, if the only limitation on the use of deception lies in the fact that the investigator happens to have a law license—but does not operate in a representa-

416. D.C. Bar Legal Ethics Comm., Op. 323 (2004).

417. *Id.* para. 1.

418. *Id.* para. 16.

419. *Id.* para. 4. Other state bar associations have likewise determined that government attorneys should not be prohibited from engaging in deception that is otherwise lawful simply because of the general deception prohibition in the *Model Rules*. *See, e.g.*, Utah State Bar Ethics Advisory Op. Comm., Op. 02-05, ¶ 2 (2002) ("A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate" Rule 8.4); Va. State Bar Standing Comm. on Legal Ethics, Op. 1765, paras. 2, 7 (2003) (reasoning "that when an attorney employed by the federal government uses lawful methods, such as the use of 'alias identities' and nonconsensual tape-recording, as part of his intelligence or covert activities, those methods" do not violate Rule 8.4(c), which has been amended in Virginia to only prohibit "conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law").

tional capacity as an attorney—then the logic that would support an investigation deception exception would apply equally to an attorney acting in a non-attorney investigative role. If an attorney's direction of an investigator's lawful use of deception is ethical, then it likewise should be ethical for the investigator to be an attorney who acts deceptively but in a non-representational capacity as a non-attorney. Once society determines that deception is needed to catch criminals, stop unlawful discrimination, or protect intellectual property rights, it would be unreasonable to exclude attorneys who do not act in a representational capacity from the mix of those permitted to use deception. An attorney not acting in a representational capacity when employing lawful deception does not undermine the sacred trust placed in attorneys to be honest and fair. If anything, the attorney's use of deception would be viewed under the larger issue of whether society generally condones the use of deception in discovering unlawful activity.

V. SOME STATES ENTER THE DEBATE: EXPRESS DECEPTION EXCEPTIONS

After embracing a full and open debate on attorney deception, a few states have enacted express deception exceptions to their ethics rules. Alaska added an official comment to its equivalent of Rule 8.4 that creates an express investigation deception exception:

> [Rule 8.4] does not prohibit a lawyer from advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights, provided that the lawyer's conduct is otherwise in compliance with these rules and that the lawyer in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Though the lawyer may advise and supervise others in the investigation, the lawyer may not participate directly in the lawful covert activity. "Covert activity," as used in this paragraph, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.[420]

Under Alaska's investigation deception exception, both government and private attorneys may direct investigators to use deception to discover violations of the civil or criminal law, but attorneys may not personally engage in the investigation using deception. Similarly, Ohio added an official comment to its version of Rule 8.4 stating that the prohibition that an attorney not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation "does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil

420. ALASKA RULES OF PROF'L CONDUCT R. 8.4 cmt. 4 (2009).

rights when authorized by law."[421] Oregon also adopted a similar investigation deception exception.[422]

Iowa adopted an investigation deception exception which goes one step further. The Iowa exception authorizes an attorney to personally engage in deception as part of an investigation, in addition to advising or supervising investigators who employ deception:

> It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules. "Covert activity" means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future. Likewise, a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule.[423]

Florida also enacted an investigation deception exception, but it only authorizes government attorneys to advise or supervise investi-

421. OHIO RULES OF PROF'L CONDUCT R. 8.4 cmt. 2A (2007).

422. *See* OR. RULES OF PROF'L CONDUCT R. 8.4(b) (2009). The *Oregon Rules of Professional Conduct* prohibit attorneys from:

> violat[ing] the *Rules of Professional Conduct*, knowingly assist[ing] or induc[ing] another to do so, or do[ing] so through the acts of another, . . . commit[ting] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, . . . engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law, . . . engag[ing] in conduct that is prejudicial to the administration of justice, . . . [or] mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

Id. R. 3.3(a)(1), R. 8.4(a)(1)–(4). That said, however, Oregon attorneys are ethically permitted to:

> advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these *Rules of Professional Conduct*. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Id. R. 8.4(b).

423. IOWA RULES OF PROF'L CONDUCT R. 32:8.4 cmt. 6 (2005); *see also* WIS. RULES OF PROF'L CONDUCT R. 20:4.1(b) (2010) (stating that notwithstanding Wisconsin's equivalents to Rules 5.3(c)(1) and 8.4, an attorney "may advise or supervise others with respect to lawful investigative activities").

gators using deception and non-representational attorneys working for certain government agencies to engage in deception.[424] Specifically, Florida's equivalent to Rule 8.4(c) contains the following deception exception:

> [An attorney shall not] engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.[425]

Along those lines, Alabama carved out a deception exception that applies only to prosecutors.[426] In a specific rule governing the "Special Responsibilities of a Prosecutor," Alabama authorizes prosecutors to direct others to engage in deception that otherwise would violate

424. *See* FLA. RULES OF PROF'L CONDUCT R. 4-8.4(c) (2010).

425. *Id.* The Utah State Bar Ethics Advisory Opinion Committee has concluded that a "governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct." Utah State Bar Ethics Advisory Op. Comm., *supra* note 419, ¶ 2. The advisory opinion made clear that it covers the conduct of all government attorneys so long as the attorney's dishonesty, fraud, deceit or misrepresentation "is part of an otherwise lawful government operation." *Id.* ¶¶ 3, 9. Relying heavily on the article authored by Isbell and Salvi, *supra* note 236, the Committee stated that "Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law. It was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful, undercover investigations." Utah State Bar Ethics Advisory Op. Comm., *supra* note 419, ¶¶ 4, 10. Trying to restrain the scope of its opinion, the Committee cautioned that it "cannot, however, throw a cloak of approval over all lawyer conduct associated with an undercover investigation or 'covert' operation," explaining that "a lawyer's illegal conduct or conduct that infringes the constitutional rights of suspects or targets of an investigation might also bring into question the lawyer's fitness to practice law." *Id.* ¶ 10. Expanding the problems surrounding the scope of the implied deception exception for a government attorney, the Committee also cautioned that there is no "license to ignore the Rules' other prohibitions on misleading conduct," such as Rule 4.1(b)'s prohibiting the failure to disclose material facts to avoid assisting a client in committing criminal or fraudulent acts and Rule 4.3(b)'s prohibiting an attorney from implying that the attorney is disinterested while representing a client and dealing with unrepresented persons. *Id.* ¶ 10 & n.20. Interestingly, and perhaps disappointingly, the Committee chose to "specifically reserve the issue of whether the analysis and result of this opinion apply to a private lawyer's investigative conduct that involves dishonesty, fraud, misrepresentation or deceit." *Id.* ¶ 10 n.1. Again, the resolution of the issue of whether attorneys may ethically engage in deception should be subject to a full and open debate, rather than a piecemeal approach to the issue from various bar committees or courts.

426. *See* ALA. RULES OF PROF'L CONDUCT R. 3.8(2)(a) (2008).

Alabama's equivalent to the *Model Rules*.[427] In explaining the scope of this express deception exception, the official comment explains that there are certain circumstances, such as undercover sting operations, where the ethical obligations of the prosecutor, as a member of the legal profession, "might prevent the government from taking action that would not otherwise be prohibited by any law."[428] The comment recognizes that in these special circumstances, lying is often essential to the operation.[429] Because attorneys, including prosecutors, are prohibited from lying under their ethics rules and from using others to do what attorneys cannot do, Alabama sought "to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law" such "that the prosecutor may order, direct, encourage and advise with respect to any lawful governmental action."[430] This includes the use of deception as part of the law enforcement activity.[431] Notwithstanding a prosecutor's authority to direct investigators to employ deception to fight crime, Alabama continues to hold prosecutors personally accountable to the *Model Rules'* attorney deception prohibition "to preserve the integrity of the profession of law."[432] Thus, Alabama recognizes only a narrow exception that applies to prosecutors only—and not attorneys generally—for the sole purpose of "accommodat[ing] the prosecutor's special responsibility in governmental law-enforcement activities."[433]

It is certainly admirable that these states have provided express deception exceptions so that attorneys can reasonably understand if and when they may ethically employ deception. Because the debate on attorney deception does not demand a singular response, however, variations on the deception exception have naturally evolved. This is not a bad development. It serves to underscore that any attempt to deploy an ad-hoc, case-by-case interpretive model to an implied deception exception will meet strong resistance. Attorneys, and the society that they serve, deserve to know the scope of permissible ethical deception.

VI. DRAFTING AN EXPLICIT INVESTIGATION DECEPTION EXCEPTION

The ABA must amend the *Model Rules* to expressly address the issue of attorney deception, regardless of how its membership ulti-

427. *Id.* R. 3.8(2).
428. *Id.* cmt.
429. *Id.*
430. *Id.*
431. *Id.*
432. *Id.*
433. *Id.*

mately votes. Hopefully, the ABA will adopt my express investigation deception exception. The problem with creating exceptions to bright-line prohibitions, however, is that you inherently leave a rock-solid foundation to find yourself in shifting sands. Once exceptions are introduced to steadfast prohibitions, the law of unintended consequences will assuredly challenge the scope of the exceptions, but that is the challenge of all law. Because a developing consensus believes that attorney ethics rules should not prohibit non-attorneys from using deception to conduct lawful investigations, the *Model Rules* should be amended to include an express investigation deception exception.

For just over a century, the ABA "has provided leadership in legal ethics and professional responsibility through the adoption of professional standards that serve as models of the regulatory law governing the legal profession."[434] From 1908 to 1964, the ABA began to put in place a regulatory framework that individual states could adopt to ensure that the legal profession, and attorneys within that system, maintained high ethical standards.[435] In 1969, the ABA moved the ethical ball forward by promulgating the *Model Code of Professional Responsibility*, which numerous states then quickly adopted.[436] From 1977 to 1983, the ABA again studied attorney ethics rules, resulting in the ABA's adoption of the *Model Rules*.[437] Given the existence of both the *Model Code* and the *Model Rules*, states had the option to adopt either approach—or a combination of the two—to regulate attorney conduct. Over the past two decades, the ABA has adopted a number of amendments to the *Model Rules*, reflecting the ongoing debate on how best to ensure ethical conduct within the legal profession to best serve society. It is time once again for the ABA to take a leadership role in hammering out the contours of a deception exception. To that end, I offer the following language to be adopted as an official comment to Rule 8.4:

> Rule 8.4's restrictions that make it unethical for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or "engage in conduct that is prejudicial to the administration of justice" are subject to a permissive investigation deception exception. This exception permits any attorney, whether government or private, and at his or her discretion, to advise, direct, and supervise a third person, including a client, to use dishonesty, deception, and misrepresentation (particularly as to identity and purpose) while investigating suspected violations of the criminal or civil law or constitutional rights so long as (1) the attorney reasonably believes that a violation of the criminal or civil law or constitutional rights has occurred or is imminent, (2) the attorney and third person comply with all laws in conducting the investigation, and (3) no other reasonable alternative is available to the attorney to

434. AM. BAR. ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT vii (6th ed. 2007).

435. *See id.*

436. *Id.*

437. *Id.*

> discover the suspected violations of the criminal or civil law or constitutional rights. An attorney who is not acting in a representational capacity (e.g., an attorney employed as an investigator for a government agency) is permitted to personally use dishonesty, deception, and misrepresentation as outlined above. An attorney acting in a representational capacity has no authority to personally use dishonesty, deception, and misrepresentation. The purpose behind this investigation deception exception is to promote the discovery of unlawful activity that otherwise often goes undetected. For example, criminal investigators may need to use deception when conducting undercover sting operations; civil rights activists may need to use deception to uncover unlawful discrimination in employment, housing, education, lending, public accommodations, and government services; and holders of intellectual property rights may need to use deception to discover violations of those rights. This investigation deception exception in no way authorizes an attorney to violate any other ethical rule. An attorney who seeks to employ deception is cautioned to review Rules 1.2(d), 3.1, 3.2, 3.3, 3.4, 4.1, 4.2, 4.3, 4.4, 5.1, 5.2, 5.3, and 7.1.

An obvious criticism of an ethics rule that authorizes attorneys to direct others to use deception while attorneys themselves cannot personally engage in the deception is that this seems to end in a logical loop. Why is it ethical for non-attorneys to engage in deception while it is unethical for attorneys to engage in deception? As maintained throughout this Article, the answer lies in the unique position that attorneys occupy in our democratic society. To ensure that society has faith in the justice system and the rule of law, it is important for the legal profession to strive to engender complete trust that attorneys act ethically by being diligent, competent, loyal, fair, and honest. Encouraging or enabling attorneys to lie and deceive—particularly when those lies and deceptions would benefit the attorney and her client—has the real potential to strike a blow to the foundation of trust that the legal profession strives to maintain in society. Additionally, attorneys do not create the conflict and generate the cases in our system. Rather, attorneys simply take on the interests of their clients, because each case belongs to the client before it belongs to the attorney. Moreover, the facts are the facts. Attorneys should not set out to make the facts of a case or preemptively create a case out of whole cloth.

Society will function just fine if attorneys do not personally engage in deception, even if society would benefit from its use. There are plenty of other interested and capable persons who can lawfully engage in deception that will inure to the benefit of society without authorizing attorneys to be perceived as self-interested liars. If society determines that it should be lawful—or unlawful for that matter—to employ deception to catch criminals, root out unlawful discrimination, or protect intellectual property rights, for instance, then citizens can respond through their elected representatives. This democratic approach to the issue far surpasses forcing attorneys to bear the societal burden of the usefulness of deception. It also maintains the integrity of the legal profession.

VII. CONCLUSION

Currently the *Model Rules* do not contain a deception exception—express or implied—that would authorize attorneys to utilize deception as part of an investigation into unlawful activity. Although attorneys should be held to the highest ethical standards and should never claim that lying is an admirable trait, society benefits through the limited and controlled use of lawful deception. Governments routinely use deception in undercover investigations to catch criminals, civil rights activists employ deception to help eradicate unlawful discrimination, and owners of intellectual property rights utilize deception to determine whether others unlawfully infringe upon those rights. If society has not outlawed the use of deception in those circumstances, then a set of ethics rules governing attorney behavior should not tamp down the ability of others to lawfully engage in deception for limited but equally important purposes. Likewise, there is no sound public policy that would require attorneys to personally engage in the deception. There is no reason to suppose that attorneys should individually bear the societal responsibility to investigate and discover unlawful activity. As long as attorneys are not precluded from directing or supervising third persons' use of deception as part of lawful investigations into unlawful activity, then attorneys should still be held to the high standard of ethical conduct that requires honesty by not being allowed to personally engage in deception.

In the final analysis, all law—and ethics rules are no exception—emanates from society's collective experience to resolve conflict. In a phrase, law is public policy that best serves a democratic society. To balance society's need to vigorously investigate unlawful activity by all lawful means with ensuring that attorneys are perceived to have unbending ethics and unyielding honesty in maintaining the system of justice and the rule of law, I propose that the ABA amend the *Model Rules* to include an express investigation deception exception. This exception would authorize attorneys to direct third persons to use deception in lawful investigations while preserving an attorney's obligation to act honestly and free from deception. This strikes a balance that serves our democratic society while protecting the sacred institution of our system of justice, in which faith in the honesty and integrity of attorneys plays an integral role.