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## In Praise of Overzealous Representation - Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct

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## IN PRAISE OF OVERZEALOUS REPRESENTATION—LYING TO JUDGES, DECEIVING THIRD PARTIES, AND OTHER ETHICAL CONDUCT

*Monroe H. Freedman\**

### I. ZEAL AND OVERZEALOUSNESS

For more than a century, the lawyer's ethic of zeal has required, and has inspired, entire devotion to the interests of the client, warm dedication in the maintenance and defense of his rights, and the exertion of the lawyer's utmost learning and ability.<sup>1</sup> In the classic statement by Henry Lord Brougham in 1820 in *Queen Caroline's Case*:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.<sup>2</sup>

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\* Professor of Law, Hofstra University School of Law; author, *UNDERSTANDING LAWYERS' ETHICS* (3d ed. 2004) (with Abbe Smith). I am grateful to Lisa Spar, Assistant Director for Reference and Instructional Services at the Deane Law Library, Hofstra University, for her invaluable research assistance.

1. See *CANONS OF PROFESSIONAL ETHICS* Canon 8 (1908) (paraphrased here); *MODEL CODE OF PROF'L RESPONSIBILITY* Canon 7 (1980) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"); *MODEL RULES OF PROF'L CONDUCT* R. 1.3 cmt. 1 ("A lawyer must . . . act with commitment and dedication to the interests of the client, and with zeal in advocacy upon the client's behalf."); *MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS* 71-127 (3d ed. 2004) ("Zealous Representation: The Pervasive Ethic").

2. *2 TRIAL OF QUEEN CAROLINE* 3 (1821). It has been erroneously stated that Brougham, later in life, repudiated this declaration. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing*

This “traditional aspiration” of zealous representation<sup>3</sup> pervades all other professional obligations of the lawyer to her client.<sup>4</sup>

Ordinarily, of course, a lawyer’s zeal on behalf of a client is to be exercised only within the law and the disciplinary rules.<sup>5</sup> “Overzealousness,” therefore, connotes conduct that goes over, or beyond, the bounds of law and/or the disciplinary rules.<sup>6</sup> By definition, therefore, it would appear that overzealousness can never be justified as ethical conduct. My argument here, however, is that zealous representation—“entire devotion to the interests of the client”—may sometimes require the lawyer to violate other disciplinary rules.

Three ethical rules that are universally recognized, and that are unquestionably sound and desirable, are that a lawyer shall not make a false statement of fact to a court,<sup>7</sup> that a lawyer shall not make a false statement of material fact to a third person,<sup>8</sup> and that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.<sup>9</sup> Yet there are circumstances in which zealous representation, which embraces the ethical requirements of competence<sup>10</sup> and confidentiality,<sup>11</sup> can require a lawyer to make a false statement to a court or to a third person, or to engage in other conduct involving dishonesty, fraud, deceit, or misrepresentation.

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*Advocacy Ethics*, 74 GEO. WASH. L. REV 1, 1-2 (2006). In fact, however, half a century later, Brougham reiterated his statement, and declared it to be the lawyer’s “sacred duty.” Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS (forthcoming 2006).

3. RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 16 cmt. d (2000).

4. See FREEDMAN & SMITH, *supra* note 1, at 71-72.

5. See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1, DR 7-101 (1980).

6. Canon 7 of the ABA’s Model Code of Professional Responsibility requires the lawyer to “Represent a Client Zealously Within the Bounds of the Law.” Significantly, nine of the ten Disciplinary Rules under Canon 7 are devoted to limits on zealous representation. See MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102 to 7-110 (1980).

7. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2004); see also MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(5) (1980).

8. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 4.1(a) (2004).

9. See *id.* at R. 8.4(c); see also MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(4) (1980).

10. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.1 (2004) (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

11. See *id.* at R. 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”).

## II. LYING TO JUDGES

Consider, for example, an issue raised with me several years ago by Legal Aid lawyers in Brooklyn. Some judges, they said, would routinely call defense counsel to the bench prior to trial in criminal cases and say, "Come on, let's move this along. Did he do it or didn't he?"<sup>12</sup>

In the large majority of cases, the honest answer to the judge's question is, "Yes, Your Honor, he's guilty as charged." To say that, however, would be a violation of the ethical requirement of confidentiality and of the client's constitutional privilege against self-incrimination.<sup>13</sup> Accordingly, the "proper" response to the judge's question is, "I'm sorry, Your Honor, but I can't ethically answer that question." However, the problem with that reply, and with similar non-responsive answers, the lawyers said, is that the judge invariably would assume that the lawyer had impliedly acknowledged her client's guilt.<sup>14</sup>

Also inadequate to zealous representation and to maintaining the client's confidences would be, "He has pleaded not guilty, Your Honor." Again, the judge will infer an acknowledgment of guilt by the lawyer. A more pertinent response would be, "Your Honor, you know that you shouldn't be asking me that question," but that answer is likely to prejudice the client even more, both by implying guilt and by criticizing the judge.

In short, the judge has improperly placed the lawyer in the position of violating confidentiality and incriminating her client.

The response to the judge that is consistent with zeal, confidentiality, competence, and the Fifth Amendment, therefore, is, "Your Honor, I have no doubt that this defendant is not guilty." That statement by the lawyer, however, would be intended to mislead the judge into believing something that the lawyer knows to be false.<sup>15</sup> It would therefore appear to involve "dishonesty, fraud, deceit, or misrepresentation," and to constitute a false statement of fact to the court. How, then, could one justify that?

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12. I do not know whether the practice persists in Brooklyn, but Professor Steven Lubet has told me that it happens currently in Chicago.

13. See FREEDMAN & SMITH, *supra* note 1, at 183-88.

14. The response, "I don't know whether he did it or not," would be a similar disservice to the client, and would frequently be false, or, at best, an equivocation. Also, Model Rule 3.4(e) forbids a lawyer to state a personal opinion about the guilt or innocence of an accused.

15. Even if the lawyer does not know whether the client is guilty, the statement would be fraudulent in the sense that "[f]raud includes the pretense of knowledge when knowledge there is none." *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 444 (1931).

As noted earlier, the judge has no right to ask the question. Model Rule 1.6 protects all information relating to the professional relationship, which includes information that might be harmful or even simply embarrassing to the client.<sup>16</sup> But, although the lawyer is trying to protect client information, there is nothing in the rule that sanctions a response that is calculated to mislead a judge.

I would like, therefore, to venture beyond the words of the ethical rules themselves, into the larger legal context of the lawyers' role, into understanding inconsistent ethical rules in the light of reason, into the purposes of legal representation in criminal cases, and into moral philosophy. My authority for doing so is the Scope section of the Model Rules themselves.

The Scope section tells us that the Rules of Professional Conduct are "rules of reason."<sup>17</sup> It tells us further that the rules "presuppose a larger legal context shaping the lawyer's role."<sup>18</sup> It tells us, moreover, that the rules must be interpreted "with reference to the purposes of legal representation and of the law itself."<sup>19</sup> Most important, it tells us that the black-letter rules "do not . . . exhaust the moral and ethical considerations that should inform a lawyer," because "no worthwhile human activity can be completely defined by legal rules."<sup>20</sup>

I have already mentioned the constitutional protection of an accused against compulsory self-incrimination. I do not want to dwell on that here, other than to observe that a lawyer cannot, consistent with the Constitution, lead the client to believe that she is "acting solely in [the client's] interest," and then, in response to a judge's question, become essentially "an agent of the State recounting unwarned statements."<sup>21</sup>

In addition, in our constitutionalized adversary system,<sup>22</sup> a criminal defendant is presumed to be innocent. The burden is on the prosecution to prove beyond a reasonable doubt that the defendant is guilty. The plea of not guilty does not necessarily mean "not guilty in fact," for the defendant may simply be exercising his right to put the government to its proof. Further, the accused who knows that he is guilty has an absolute constitutional right to remain silent. Moreover, the lawyer's role in that system is further defined by the ethical obligation to give "entire

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16. See MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(A) (1980).

17. MODEL RULES OF PROF'L CONDUCT Scope ¶ 14 (2004).

18. *Id.* at ¶ 15.

19. *Id.* at ¶ 14.

20. *Id.* at ¶ 16.

21. *Estelle v. Smith*, 451 U.S. 454, 467 (1981), discussed in FREEDMAN & SMITH, *supra* note 1, at 183-85.

22. See FREEDMAN & SMITH, *supra* note 1, at 13-43 ("The Adversary System").

devotion to the interests of the client.” As the ABA has said, therefore, the criminal defense lawyer is the client’s lone champion against a hostile world.<sup>23</sup>

Moreover, as noted above, the Scope section of the Model Rules enjoins the lawyer to recognize that there are “moral and ethical considerations” beyond the rules themselves that should inform the lawyer’s professional conduct.<sup>24</sup> With regard to conduct involving dishonesty, fraud, deceit, or misrepresentation, there might appear to be no conflict between rules of lawyers’ ethics and familiar systems of moral philosophy. St. Augustine, for example, was explicit that lying is intrinsically evil and is never morally permissible, and that, if one speaks at all, the truth must be told regardless of the consequences.<sup>25</sup> Anticipating Kant’s categorical imperative, Augustine argued that if the victim of a would-be murderer is hiding in a man’s house, the man may refuse to answer, but that he may not deny that the victim is there.<sup>26</sup>

In the light of that illustration, it is not surprising that “the question of lying creates great difficulties for the moralist.”<sup>27</sup> For theologians, in particular, both the Jewish Scriptures and the Christian Gospels present difficulties.

In Genesis, for example, when Sarah learns that God will give her a child, Sarah laughs, saying that *both* she and Abraham are too old to conceive a child.<sup>28</sup> When God relates this to Abraham, however, He says only that Sarah had said that *she* was too old to conceive.<sup>29</sup> Recognizing that God has told less than the whole truth, rabbinical authorities have understood God’s equivocation to have been justified by the overriding importance of maintaining peace between husband and wife.<sup>30</sup> Thus, telling the whole truth would appear not to be a categorical imperative.

Another example of biblical endorsement of lying is when the Egyptian midwives give Pharaoh a false explanation to cover up their disobedience to his command that they kill all the male infants born to

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23. ABA, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 145 (Approved Draft, 1971).

24. See *supra* notes 17-20 and accompanying text.

25. ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 196 (1988) (citing ST. AUGUSTINE, DE MENDACIO ¶ 6); see also *Lying*, in NEW ADVENT CATHOLIC ENCYCLOPEDIA, at <http://www.newadvent.org/cathen/> [hereinafter NEW ADVENT].

26. See *Lying*, in NEW ADVENT, *supra* note 25.

27. *Id.*

28. Genesis 18:12.

29. See *id.* at 18:13.

30. THE PENTATEUCH AND HAFTORAHS 64 n.13 (J.H. Hertz ed., 2d ed. 1981).

the Hebrews. God approves of the midwives' conduct, including their lies to Pharaoh, and rewards them.<sup>31</sup>

Further, when Jesus is asked when the Day of Judgment will come, he replies, "But of that day and that hour knoweth no man, no, not the angels which are in heaven, neither the Son, but the Father."<sup>32</sup> Catholic theologians have reasoned that Jesus could not have been speaking the truth because, as the Son of God, He must have known the answer to the question. What then are we to make of his statement?

One response to that question is St. Thomas Aquinas' doctrine of mental reservation, which is a form of morally justifiable equivocation. That is, there are circumstances in which "[i]t is licit to hide the truth prudently by some sort of dissimulation."<sup>33</sup> In the case of Jesus' denial of knowledge of the Day of Judgment, for example, His justifiable mental reservation is that the Son has no knowledge *that the questioner is entitled to know*.

That reasoning has produced a variety of illustrative situations. A simple one is a husband who tells a door-to-door salesman, contrary to fact, that his wife is not at home, when the husband means, in his own mind, "She is not at home *to you*."

A more important illustration is of the priest who is asked whether a penitent has confessed certain self-incriminatory information to the priest. For the priest to answer simply that he cannot reveal what he has been told under the sacred seal of the confessional, could be taken to imply that there has indeed been an incriminating confession. In such a case, the priest can properly deny that any admission has been made. The justification, again, is that the questioner has no right to a truthful answer, and the priest may therefore make use of a mental reservation such as, "The penitent has not made any such admission to me *outside the confessional, and, therefore, he has made no admission that I can reveal to you*."

To provide a necessary stopping point to the doctrine of mental reservation, Catholic theologians have circumscribed it by the requirement that the hearer should be able to recognize the equivocation for what it is, on the basis of factors external to the mind of the

31. *Exodus* 1:15-20.

32. *Mark* 13:32 (King James); *see also Matthew* 24:36.

33. JONSEN & TOULMIN, *supra* note 25, at 197 (citing ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* II-II, question 110, arts. 3 and 4). The Scholastics elaborated on this idea. In the early thirteenth century, St. Raymund of Pennafort wrote in his *Summa* that in the case of the would-be murderer, the owner of the house may, if necessary, deny that the victim is in the house. *See Lying, in NEW ADVENT, supra* note 25.

speaker.<sup>34</sup> For example, a close listener might recognize an ambiguity in the words used, or the hearer might be able to recognize the presence of a mental reservation because of the special role and responsibilities of the speaker, for example, as a priest, as a lawyer, or as a doctor. “Prudent [people] only speak about what they should speak about, and what they say should be understood with that reservation.”<sup>35</sup>

Let us return, then, to the judge who questions the lawyer about the guilt or innocence of his client. I have said that the lawyer is justified in answering, “Your Honor, I have no doubt that this client is innocent.” Here are my reasons.

First, the judge has no right to ask the question and to expect an honest answer. Second, the lawyer is forbidden by both her ethical and her constitutional responsibilities to answer the question honestly. Third, a refusal to answer will be taken as an admission of the client’s guilt. Fourth, the lawyer’s response is not literally false, because it is a form of morally justifiable equivocation. That is, although the lawyer’s statement is intentionally misleading, it is technically accurate, because the client is presumed to be innocent, and is not legally guilty until the jury has found him to be guilty after a trial. Moreover, the judge should know that the lawyer’s role—including the lawyer’s constitutional and ethical responsibilities—justify the lawyer’s wide mental reservation: “My client is innocent, *because under the Constitution and laws of the United States, my client is innocent until proven guilty beyond a reasonable doubt.*”

In sum, returning to the Scope section of the Model Rules, I believe that this conclusion is consistent with the larger legal context of the lawyers’ role, including the client’s overriding constitutional right to effective assistance of counsel and his privilege against self-incrimination; that the conclusion is justified by treating the lawyer’s obligations—of zealous representation, of confidentiality, of competence, and of truthfulness to judges—as rules of reason, to be weighed according to context, including, here, a criminal trial; and that the conclusion is justified in terms of the “moral and ethical considerations that should inform a lawyer”<sup>36</sup> beyond the bounds of the disciplinary rules themselves.

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34. This is referred to as a “wide mental reservation.” This is to be distinguished from a “strict mental reservation,” which is illicit, and which occurs when the hearer has no way of recognizing the equivocation other than by reading the mind of the speaker. See *Mental Reservation*, in NEW ADVENT, *supra* note 25.

35. *Lying*, in NEW ADVENT, *supra* note 25.

36. MODEL RULES OF PROF’L CONDUCT Scope ¶ 16 (2004).

## III. DECEIVING THIRD PARTIES AND JUDGES IN NEGOTIATIONS

With regard to deceiving third parties, we have, again, clear and desirable rules. Model Rule 4.1(a) forbids a lawyer to make a false statement of material fact to a third person.<sup>37</sup> Model Rule 8.4, as we have seen, forbids a lawyer to engage in conduct involving dishonest, fraud, deceit, or misrepresentation.<sup>38</sup>

Assume, then, that the plaintiff in a civil case has said to his lawyer, "I would like to get a settlement of \$100,000, but if the best you can do is \$75,000, take it." When the lawyer then opens negotiations with the defendant's lawyer, the latter says, "We'll give you \$150,000, but not a penny more." The plaintiff's lawyer responds, "My client is insisting on no less than \$200,000." After further negotiations, the parties agree on \$175,000.

It would appear that the plaintiff's lawyer has violated Model Rule 4.1(a) by making a false statement of material fact to the defendant's lawyer, and has violated Model Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. His client has expressed a hope of recovering \$100,000 and a willingness to settle for \$75,000, and the lawyer has made a flat-out misrepresentation by saying that his client is insisting on nothing less than \$200,000. Nevertheless, Comment 2 to Model Rule 4.1 defines this particular kind of misrepresentation of material fact as a "convention," which means that it is permitted on grounds of acceptable mental reservation.<sup>39</sup> As the comment explains, "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact."<sup>40</sup> Such "generally accepted conventions" include "a party's intentions as to an acceptable settlement of a claim."<sup>41</sup> Moreover, the ABA has recognized that a client's minimum or maximum settlement figure is protected under Model Rule 1.6 as confidential information.<sup>42</sup> Thus, the opposing lawyer can identify the equivocation or mental reservation by awareness of his adversary's role, including the adversary's obligation of confidentiality, and an awareness of accepted custom in such circumstances.

What then if a judge, pursuant to law in the federal system and many states, requires the lawyers in a case before her to engage in

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37. See MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2004).

38. See *supra* note 9 and accompanying text.

39. See MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2004).

40. *Id.*

41. *Id.*

42. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993).

pretrial settlement conferences? One method used by some judges is to confer with each lawyer separately, and inquire as to each client's minimum or maximum settlement figure.

The ABA Committee on Ethics and Professional Responsibility has recognized that such information is protected as confidential under Model Rule 1.6, and that giving such information to the judge will ordinarily significantly prejudice the client's position in the case.<sup>43</sup> The Committee has also noted that the Model Code of Judicial Conduct forbids a judge to pressure parties to reveal confidential information.<sup>44</sup> Further, the Committee has recognized that judges enjoy a "superior position of authority," particularly with respect to lawyers who appear before the judge regularly, and that some judges have abused that superior authority in compulsory settlement conferences.<sup>45</sup>

Consistent with Comment 2 to Model Rule 4.1, therefore, the lawyer should be permitted to engage in the convention of giving the judge an inflated or deflated figure for purposes of settlement negotiations. Surely the judge will be as aware as opposing counsel of the lawyer's role, of the lawyer's ethical obligation of confidentiality, and of conventions in negotiation. More important, as the Committee has recognized, some judges have been known to abuse their superior position of authority. One way that happens, with no realistic opportunity for redress, is by the judge's subsequently ruling against the client in any close questions that arise during trial if the lawyer refuses to answer the judge.<sup>46</sup> Accordingly, if a lawyer declines to respond to a judge's demand for her client's ultimate settlement position, it can be highly prejudicial to the client. These would seem to be compelling reasons to recognize that just as a lawyer can properly give an inflated or deflated settlement figure to an adversary, the lawyer may do likewise with a judge.

Nevertheless, with no adequate analysis or explanation,<sup>47</sup> ABA Formal Opinion 93-370 concludes that a lawyer may decline to answer the judge's demand for an ultimate settlement figure, but that he cannot

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43. *See id.*

44. *Id.*

45. *Id.*

46. *See* FREEDMAN & SMITH, *supra* note 1, at 124 (United States District Court Chief Judge Marvin Aspen relating such conduct on the part of judges to retaliate against lawyers of whom the judges disapprove).

47. For example, the Opinion simply contradicts Comment 2 to Model Rule 4.1 by saying, "a party's actual bottom line or the settlement authority given to a lawyer is a material fact."

ethically give the judge an inaccurate figure.<sup>48</sup> For reasons already discussed, I disagree.

#### IV. STING OPERATIONS INVOLVING DISHONESTY

In the 1960s, I was involved in efforts to enforce the District of Columbia's rules against racial discrimination in housing. The only way to make a case of discrimination was through "testers." An African-American couple would purport to be interested in buying or renting a house in a particular neighborhood. They would claim to be married and to have two children and a particular income level. Immediately after they were told that no houses were available for sale or rent in the neighborhood, a white couple purporting to have the same family and income would apply for a house. When the white couple was then shown two or three available houses, there would be persuasive evidence of racial discrimination.

This was a reasonable way—in fact, a necessary way—to carry the burden of proving discrimination. The problem is that under the Model Rules, my conduct would have been unethical. Acting through others (the testers), I made material misrepresentations of fact to the real estate brokers and engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation.<sup>49</sup>

As recognized by Second Circuit Judge James L. Oakes, "the private lawyer who participates in a sting operation almost necessarily runs afoul of the canons of legal ethics . . . ."<sup>50</sup> Oakes went on to explain that a lawyer is forbidden to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation,"<sup>51</sup> and that lawyers are subject to this duty even when they are not acting in their capacity as lawyers.<sup>52</sup>

Despite the plain meaning of the ethical rules, however, courts regularly accept evidence that is produced by undercover or sting

48. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993).

49. The same was true then under Canon 15 of the Canons of Professional Ethics, which proscribed "any manner of fraud or chicanery." MODEL CODE OF PROF'L RESPONSIBILITY Canon 15 (1980).

50. *United States ex rel. Vuitton et Fils S.A. v. Klayminc*, 780 F.2d 179, 187 (2d Cir. 1985) (Oakes, J. dissenting), *rev'd sub nom. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). Judge Oakes objected to privately run sting operations that do not have prior judicial approval from a court; this issue was not reached by the Supreme Court, which reversed the majority decision on broader grounds.

51. *Id.* at 187 (citing MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1980); MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (1983)).

52. See *id.* at 187-88 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 336 (1974)).

operations. For example, two years before Judge Oakes' observations, the Seventh Circuit was able to say:

This court and others have repeatedly approved and sanctioned the role of "testers" in racial discrimination cases. . . . It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. . . . [W]e have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination.<sup>53</sup>

This judicial disposition to admit the fruits of sting operations is not restricted to cases of racial discrimination, but extends to commercial cases as well. For example, in a case involving testers who misrepresented themselves in order to expose trademark violations by a client's competitor, the court held that excluding the evidence that had been obtained by the testers "would not serve the public interest or promote the goals of the disciplinary rules."<sup>54</sup> Also, in another unfair trade case, the court relied on an affidavit of Professor Bruce Green, who stated that "[t]he 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."<sup>55</sup> Again, the court admitted the evidence developed through a sting operation involving misrepresentations.<sup>56</sup>

What, then, is a conscientious lawyer to do? Can she, consistent with zealous representation, fail to develop essential evidence that is only available through a sting operation? Indeed, if "the prevailing view in the legal profession" is that such conduct is not ethically proscribed, and if courts are admitting such evidence, can a lawyer comply with the obligation of competent representation if she fails to conduct the sting that is essential to establishing her client's rights?<sup>57</sup>

## V. CONCLUSION

This Article has dealt principally with three ethical rules that are both clear and highly desirable—Model Rule 3.3(a)(1), which forbids a

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53. *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983).

54. *Gidatex v. Campaniello*, 82 F. Supp. 2d 119, 126 (1999).

55. *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 475 (1998).

56. *See id.* at 477.

57. Competence requires "the legal . . . preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004). A lawyer "shall not . . . [h]andle a legal matter without preparation adequate in the circumstances." MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101(A)(2) (1980).

lawyer to make a false statement of fact to a tribunal; Model Rule 4.1(a), which forbids a lawyer to make a false statement of material fact to a third person; and Model Rule 8.4(c), which proscribes conduct involving dishonesty, fraud, deceit, or misrepresentation. It has also recognized that overzealousness, by definition, refers to conduct that exceeds the bounds of ethical rules.

Nevertheless, I have argued that there are circumstances in which zealous representation—that is, “entire devotion to the interests of the client”—may sometimes require the lawyer to violate these salutary disciplinary rules.

In reaching that conclusion, I have ventured beyond the words of the ethical rules themselves, into the larger legal context of the lawyers’ role, into understanding inconsistent ethical rules in the light of reason, into the purposes of legal representation, and into moral philosophy.

My authority for doing so is the Scope section of the Model Rules themselves. The Scope section tells us that the Rules of Professional Conduct are “rules of reason.”<sup>58</sup> It tells us further that the rules “presuppose a larger legal context shaping the lawyer’s role.”<sup>59</sup> It tells us, moreover, that the rules must be interpreted “with reference to the purposes of legal representation and of the law itself.”<sup>60</sup> Most important, it tells us that the black-letter rules “do not . . . exhaust the moral and ethical considerations that should inform a lawyer,” because “no worthwhile human activity can be completely defined by legal rules.”<sup>61</sup>

Accordingly, by considering the larger legal context of the lawyer’s role, including our clients’ constitutional rights; by understanding inconsistent ethical rules in the light of reason; and by applying insights of moral philosophy, I have concluded that there are circumstances in which a lawyer can ethically make a false statement of fact to a tribunal, can ethically make a false statement of material fact to a third person, and can ethically engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

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58. MODEL RULES OF PROF’L CONDUCT Scope ¶ 14 (2004).

59. *Id.* at ¶ 15.

60. *Id.* at ¶ 14.

61. *Id.* at ¶ 16.