

# PRETEXTING: A NECESSARY MEANS TO A NECESSARY END?

## TABLE OF CONTENTS

I. Introduction .....	791
II. The Hewlett-Packard Scandal as an Example of Why Exceptions to Honesty Are a Degradation of the Practice of Law .....	793
III. Congressional Response to the Hewlett-Packard Scandal.....	796
IV. The Moral Dilemma of Seeking Necessary Information at the Cost of Integrity .....	797
A. Justification for the Use of Deception by Public Attorneys.....	798
B. Justification for the Use of Deception in Private Practice .....	801
V. The Iowa Code of Professional Conduct's Exception to the Use of Dishonesty, Fraud, Deceit, and Misrepresentation .....	803
VI. Conclusion .....	807

## I. INTRODUCTION

How can you tell when a lawyer is lying? His lips are moving. This joke, along with others, is commonplace in offices, bars, and email forwards. How can the character of lawyers be categorically regarded as dishonest when rules of professional conduct dictate that the lawyer act honestly? Unfortunately, cynical views of lawyers are perpetuated by the legal profession itself. When the profession condones the use of these dishonest tactics by adopting exceptions to rules of professional conduct regarding honesty, the profession as a whole is viewed as dishonest.

The dishonest tactic of gathering information known as pretexting has garnered much attention as of late with several legal minds authorizing its use in the investigation of a leak in the boardroom of one of the largest companies in the world—Hewlett-Packard. The Hewlett-Packard pretexting scandal is a good example of the potential negative impacts of making exceptions to honesty.

To understand the root of the pretexting controversy, one must have an understanding of what pretexting means. As defined, a pretext is “[a] false or weak reason or motive advanced to hide actual or strong reason or

motive.”<sup>1</sup> The term pretext has its origin in the Latin word *texere*, “‘to weave, to fabricate’; from that came the metaphor ‘to weave a web of lies’ and ‘to fabricate a story.’”<sup>2</sup> “The investigation industry defines pretexting broadly as almost any form of deception employed to obtain private information.”<sup>3</sup> In other words, it simply means lying. Hewlett-Packard used this tactic when its general counsel, along with other attorneys within the company, employed investigators who posed as members of the board of directors in order to obtain telephone records and uncover a boardroom leak.<sup>4</sup>

While the ABA Model Rules of Professional Conduct label a lawyer’s “conduct involving dishonesty, fraud, deceit or misrepresentation”<sup>5</sup> as professional misconduct, recently some states have adopted exceptions to the rules of professional conduct that suggest the deplorable use of similarly dishonest practices may be acceptable.<sup>6</sup>

This Note will attempt to explain the ethical implications behind a lawyer’s use of deception to gather private information. Part II will look at the Hewlett-Packard scandal as an example of how a lawyer’s use of deception degrades the public’s perception of lawyers.<sup>7</sup> Part III looks at the congressional response to the Hewlett-Packard scandal.<sup>8</sup> Part IV discusses the moral dilemma of seeking necessary information at the cost of integrity in both public and private practice.<sup>9</sup> Part V discusses how some states, like Iowa, have adopted comments to the Model Rules of Professional Conduct that allow for the use of some deception, and may even indirectly allow the use of pretexting.<sup>10</sup> In conclusion, this Note will propose that exceptions to Rule 8.4(c) of the Model Rules of Professional Conduct be repealed as a solution to the use and justification of dishonest tactics like pretexting in the legal profession.<sup>11</sup>

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1. Black’s Law Dictionary 1225 (8th ed. 1999).
  2. William Safire, *Pretexting*, N.Y. TIMES MAG., Sept. 24, 2006, at 20.
  3. Michael A. Hiltzik, *State’s HP Case May Be Tough to Win*, L.A. TIMES, Sept. 15, 2006, at C1.
  4. *Id.*
  5. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2006).
  6. *See* discussion *infra* Part V.
  7. *See* discussion *infra* Part II.
  8. *See* discussion *infra* Part III.
  9. *See* discussion *infra* Parts IV.A–B.
  10. *See* discussion *infra* Part V.
  11. *See* discussion *infra* Part VI.

## II. THE HEWLETT-PACKARD SCANDAL AS AN EXAMPLE OF WHY EXCEPTIONS TO HONESTY ARE A DEGRADATION OF THE PRACTICE OF LAW

An example of a situation that questions the validity of exceptions to the rules of professional conduct regarding honesty and the moral cost of not living the black letter ethical rules is the Hewlett-Packard scandal. "Hewlett-Packard has long been one of the most admired companies in America."<sup>12</sup> As a result, it came as a surprise to most people when they were informed that Hewlett-Packard resorted to the use of pretexting in an effort to uncover a boardroom leak.<sup>13</sup> Prior to the Hewlett-Packard scandal, few people knew what the term "pretexting" meant, even though most people had an understanding of the process.<sup>14</sup> However, since the scandal was reported by several major media outlets, "pretexting" is no longer an unfamiliar term, or an unfamiliar practice.<sup>15</sup> In the congressional hearing on the Hewlett-Packard scandal, Representative Walden accurately summed up the process of pretexting when he said, "I am going to lie to somebody to get the personal and private information on somebody else so that I can use it to my advantage."<sup>16</sup> The authorized use of pretexting by the chairman of the board of directors and general counsel led many to ask, "where were the legal and ethical guardians of HP's corporate interests when all of this was happening, and whose job was it to steer this ship clear of the icebergs?"<sup>17</sup> "The red flags were waving all over the place raising questions about the legality of pretexting, but none of the lawyers stepped up to their responsibilities."<sup>18</sup>

The Hewlett-Packard controversy arose when confidential materials that were presented in board meetings and other confidential board room

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12. *Hewlett-Packard's Pretexting Scandal: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 109th Cong. 1 (2006) (statement of Rep. Ed Whitfield, Chairman, Subcomm. on Oversight and Investigations) [hereinafter *Hearing*].

13. *Id.* at 1–2.

14. *Id.* at 12 (statement of Rep. Greg Walden) (stating that before the Hewlett-Packard scandal he had "never heard of the word 'pretexting,' and I doubt that I am alone in that").

15. *See id.* at 11–12 (statement of Rep. Tammy Baldwin) ("[I]t has taken this Hewlett-Packard boardroom spying scandal to make pretexting a household word.").

16. *Id.* at 12 (statement of Rep. Greg Walden).

17. *Id.* at 6 (statement of Rep. Dianna DeGette).

18. *Id.* at 13 (statement of Rep. John D. Dingell).

information that undermined Hewlett-Packard were leaked to the press.<sup>19</sup> This problem was evident when the directors read the January 24, 2005 edition of the *Wall Street Journal*, which included an article on the first page listing sensitive details of a strategy meeting, some of which were only known to board members.<sup>20</sup>

Shortly after Patricia Dunn was elected as the new chairman, she was given the responsibility of finding a new CEO and putting an end to the leaks—shortly thereafter an investigation ensued.<sup>21</sup> During this first investigation, the investigators did not employ pretexting or other questionable investigative tactics, and the investigation proved to be both ineffective and inconclusive.<sup>22</sup> Although the investigation was inconclusive in determining the source of the leak, there were no boardroom leaks while the investigation was being conducted.<sup>23</sup> As a result, the investigation concluded and life in the boardroom returned to normal until January 2006. On January 23, 2006 an article was published on CNET (a leading technology website) that discussed, in detail, highly confidential information about the company's relationships and proposed acquisitions.<sup>24</sup> Patricia Dunn, the chairman of the board, not only felt that these statements were detrimental to the company, but also felt they could potentially expose Hewlett-Packard to liability under federal securities laws.<sup>25</sup> It was under these circumstances that Dunn decided to re-initiate the investigation into the leak.

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19. Patricia C. Dunn, Submission to Subcomm. on Investigations H. Energy and Commerce Comm.: My Role in the Hewlett-Packard Leak Investigation 1–2 (Sept. 28, 2006), <http://republicans.energycommerce.house.gov/108/hearings/09282006Hearing2042/Dunn.pdf> [hereinafter Dunn Statement].

20. *Id.* at 2; see Pui-Wing Tam, *Hewlett-Packard Board Considers a Reorganization—Management Moves Stem From Performance Concerns; Helping Fiorina 'Succeed'*, WALL ST. J., Jan. 24, 2005, at A1 (outlining various confidential aspects of the restructuring of power within Hewlett-Packard that were only known to the board of directors, and naming the source of the information as “people familiar with the matter”).

21. See Dunn Statement, *supra* note 19, at 2.

22. *Id.* at 15.

23. See *id.* (stating that after the investigation failed, “no significant leaks from the boardroom had occurred for several months,” and that she “hoped that simply the knowledge of an investigation had brought [the leaks] to a halt”).

24. *Id.* at 17; see Dawn Kawamoto & Tom Krazit, *HP Outlines Long-Term Strategy*, CNET, Jan. 23, 2006, [http://www.news.com/HP-outlines-long-term-strategy/2100-1014\\_3-6029519.html](http://www.news.com/HP-outlines-long-term-strategy/2100-1014_3-6029519.html).

25. Dunn Statement, *supra* note 19, at 17.

Under the supervision of the chairman of the board, senior legal counsel, and the chief ethics lawyer, Hewlett-Packard initiated a more in-depth investigation.<sup>26</sup> Hewlett-Packard's team of investigators included the director of ethics, "the company's internal global security operation and outside detectives."<sup>27</sup> These investigators employed pretexting and other subterfuge to obtain the personal phone records of the members of the board of directors and nine journalists who reported stories of the leaks.<sup>28</sup> In this case, the private investigators posed as members of the board of directors and various journalists to telephone companies in order to obtain copies of their phone records and link the records back to the leak.<sup>29</sup> Former in-house counsel and ethics chief for Hewlett-Packard, Kevin Hunsaker, headed the investigation and surprisingly did not act without authorization from his superiors and outside counsel.<sup>30</sup> "Outside lawyers repeatedly told [Hewlett-Packard] that the investigative practices they were using were legal and 'not generally unlawful.'"<sup>31</sup>

In the end, the investigation fingered George A. Keyworth, who had recently resigned from the board, and who eventually acknowledged that he was the source of the leak.<sup>32</sup> While this method proved to be extremely effective in finding the leak, at what cost did it come? A much respected chairman, a general counsel, and an ethics counsel were all forced to step down from their positions atop one of the largest companies in the world.<sup>33</sup>

The public admiration of lawyers took yet another hit with this scandal, and it was a direct result of the failure to follow the black letter rule of ethics to act honestly. For lawyers, "[s]ometimes the ends obscure the means, especially when the request for results comes from on high. Yet it is in-house counsel's responsibility to their client, and to themselves, to serve as a check on the desire for results when those results will be achieved by questionable means."<sup>34</sup> There is no doubt that in this

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26. See *Hearing*, *supra* note 12, at 3–4 (statement of Rep. Ed Whitfield).

27. Matt Richtel, *Hewlett's Hunt for Leak Became a Game of Clue*, N.Y. TIMES, Sept. 29, 2006, at A1.

28. David A. Kaplan, *Suspicious and Spies in Silicon Valley*, NEWSWEEK, Sept. 18, 2006, at 40, 41.

29. *Id.*

30. Molly McDonough, *Ex-Ethics Counsel Indicted in HP Privacy Scandal*, A.B.A. J. E-REPORT (Oct. 6, 2006), <http://www.abanet.org/journal/ereport/oc6hp.html>.

31. *Id.*

32. Richtel, *supra* note 27, at A1.

33. *Id.*

34. David Fein & Robert Hoff, *Internal Investigations: Hewlett-Packard's*

information age, other divisive and deceptive tactics will be created to gather information, and as lawyers we have the duty to not employ such tactics even though they may be considered legal. If the lawyers involved with Hewlett-Packard would have followed the black letter rules of ethics that dictate the practice of honesty, this scandal would not have happened, and the public would not have lost respect for lawyers and the legal system.

### III. CONGRESSIONAL RESPONSE TO THE HEWLETT-PACKARD SCANDAL

While Congress knew of the dangers of pretexting long before the Hewlett-Packard scandal, it was not until after the Hewlett-Packard scandal that Congress passed legislation making pretexting illegal when used to obtain phone records.<sup>35</sup> On January 12, 2007, Congress passed the Telephone Records and Privacy Protection Act of 2006.<sup>36</sup> The Act states, in pertinent part:

Whoever, in interstate or foreign commerce, knowingly and intentionally obtains, or attempts to obtain, confidential phone records information of a covered entity, by—(1) making false or fraudulent statements or representations to an employee of a covered entity; (2) making such false or fraudulent statements or representations to a customer of a covered entity; (3) providing a document to a covered entity knowing that such document is false or fraudulent; or (4) accessing customer accounts of a covered entity via the Internet . . . without prior authorization from the customer to whom such confidential phone records information relates; shall be fined under this title, imprisoned for not more than 10 years, or both.<sup>37</sup>

While this statute criminalizes the use of pretexting when used to obtain phone records, it does not criminalize its use in other situations.<sup>38</sup> The law is designed to prevent investigators from fraudulently obtaining phone records like those involved in the Hewlett-Packard scandal. Now, lawyers who use pretexting to acquire personal phone records will be violating federal law. However, lawyers should not need Congress to act in order for their moral compasses to let them know that obtaining information fraudulently through the use of dishonest tactics is wrong.

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*Lessons*, N.Y.L.J., Nov. 6, 2006, at 4.

35. Telephone Records and Privacy Protection Act of 2006, Pub. L. No. 109-476, 120 Stat. 3568 (2007).

36. *Id.*

37. *Id.* at 3569.

38. *See id.*

#### IV. THE MORAL DILEMMA OF SEEKING NECESSARY INFORMATION AT THE COST OF INTEGRITY

Lawyers, both in public and private practice, have long used deceptive tactics to ascertain facts and gather evidence.<sup>39</sup> Some argue that the use of deception is necessary to gather evidence or information in some investigations.<sup>40</sup> The question raised thus far is whether it is morally acceptable to obtain necessary information at the sacrifice of personal integrity. Judicial beliefs demonstrate that the answer depends on the situation, the actors, and the intent of the deceitful party.<sup>41</sup> For example, on one hand it may be seen as morally acceptable for a public lawyer or law enforcement officer to use pretexting and other deceitful practices if it is considered to be for the public good.<sup>42</sup> On the other hand, however, it is generally deemed morally unacceptable for a practicing attorney to authorize the use of pretexting to benefit his client.<sup>43</sup> Different standards afforded to different parties only produces confusion and leads to the justification of the use of deception—given the lack of clarity with which deception has been handled. Both public attorneys and private attorneys should be required to adhere to the same ethical rules that prevent the use of the dishonest practice of using deceit as a method to gather information. As Justice Brandeis noted in *Olmstead v. United States*<sup>44</sup>:

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 law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites

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39. See, e.g., 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, 792 (1995) (discussing lawyers' use of investigators and the use of misrepresentation).

40. Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 728 (1989).

41. See discussion *infra* Parts IV.A–B.

42. See discussion *infra* Part IV.A.

43. See discussion *infra* Part IV.B.

44. *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

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.<sup>45</sup>

The jokes, cynicism, and diminishing public confidence related to lawyers and the legal system “signal that we are not living up to our obligation.”<sup>46</sup> While some argue that the end may justify the means,<sup>47</sup> when the cost is integrity, the legal profession loses. “Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest.”<sup>48</sup> Such losses can be seen today in the Hewlett-Packard scandal with people questioning “where were the lawyers?”<sup>49</sup> Inconsistent rules lead to inconsistent practices. There needs to be consistency between the use of deceptive practices in public and private practice if there is going to be respect for the legal system.

#### A. Justification for the Use of Deception by Public Attorneys

Public prosecutors and other law enforcement officers often use pretexting as a means of ascertaining facts, gathering evidence, and detecting unlawful behavior in the public’s best interest.<sup>50</sup> Lawyers in public practice, such as prosecutors and other law enforcement officers, often employ investigators or police officers who use misrepresentation or other deceptive tactics to be effective.<sup>51</sup> While the use of some deceptive tactics is allowed for police officers, lawyers are to follow a higher standard. “Lawyers, as guardians of the law, play a vital role in the preservation of society . . . A consequent obligation of lawyers is to maintain the highest

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45. Shine, *supra* note 40, at 728 (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).

46. *In re Pautler*, 47 P.3d 1175, 1178 (Colo. 2002).

47. See Rebecca B. Cross, Comment, *Ethical Deception by Prosecutors*, 31 FORDHAM URB. L.J. 215, 233 (2003) (concluding that prosecutors should be allowed to use deceit when the benefits will significantly outweigh the costs).

48. *Pautler*, 47 P.3d at 1179.

49. See, e.g., *Hearing*, *supra* note 12, at 6 (statement of Rep. Dianna DeGette) (“[W]here were the legal and ethical guardians of H.P.’s corporate interests when all of this was happening . . . ?”); *id.* at 15 (statement of Rep. John D. Dingell) (“There were red flags waving all over the place raising questions about the illegality of pretexting. But none of the lawyers stepped up to their responsibilities.”).

50. See Cross, *supra* note 47, at 227–28 (“Disciplinary authorities have allowed prosecutors to supervise and direct investigations involving deceit” on the grounds that “public policy favors deception over unchecked lawlessness”).

51. See Isbell & Salvi, *supra* note 39, at 800.



standards of ethical conduct.”<sup>52</sup> Justice Sutherland once stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>53</sup>

Many advocates of public attorneys’ use of deceit to gather information rely on the extreme example of the public attorney in *In re Pautler*<sup>54</sup> to promote their justification of its use.<sup>55</sup> This justification is misplaced. In *Pautler*, a Chief Deputy District Attorney, along with other law enforcement officers, was investigating the gruesome murder scene of three female victims.<sup>56</sup> After killing two women, defendant William Neal bound J.D.Y., another woman, to the bed while he murdered another woman in front of her by splitting the victim’s skull with a wood splitting maul.<sup>57</sup> After brutally murdering three women, Neal took J.D.Y. to another apartment where two of her friends were and took them hostage for thirty hours.<sup>58</sup> After thirty hours, Neal left the apartment giving instructions to the three hostages to contact the police and page him when they arrived.<sup>59</sup> After contacting the police, the sheriff, Pautler, and other law enforcement officers arrived at the apartment and telephoned Neal in

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52. *Pautler*, 47 P.3d at 1178 (quoting COLO. RULES OF PROF’L CONDUCT pmb1. (2002)).

53. *Berger v. United States*, 295 U.S. 78, 88 (1935).

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

55. See, e.g., W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and “Lying with an Explanation,”* 44 S. TEX. L. REV. 53, 73 (2002) (disagreeing with the holding in *Pautler* and proposing the idea of not punishing Pautler for “lying with an explanation”).

56. *Pautler*, 47 P.3d at 1176.

57. *Id.* at 1177.

58. *Id.*

59. *Id.*

response to his request.<sup>60</sup> After the sheriff developed a rapport with Neal during a three-and-a-half hour conversation, Neal made it clear that he would not surrender without legal representation.<sup>61</sup> After requesting a specific attorney that had represented him previously, Neal requested to speak with a public defender.<sup>62</sup> The attorney who had previously represented him was not available, and Pautler did not trust contacting any public defender—even though he later testified to the contrary—and felt that a defense lawyer would advise Neal not to talk.<sup>63</sup> Pautler then decided to impersonate a public defender and after communicating himself as Neal's lawyer, secured Neal's surrender.<sup>64</sup> At no time did Pautler ever try to correct his misrepresentations.<sup>65</sup>

Pautler was charged with violating Rule 8.4(c) of the Colorado Rules of Professional Conduct, which is identical to the ABA Model Rules of Professional Conduct, and states: “‘It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.’”<sup>66</sup> The Supreme Court of Colorado held that “Pautler violated a duty he owed to the public, the legal system, and the profession.”<sup>67</sup> The court stated “[h]is role of prosecutor makes him an instrument of the legal system, a representative of the system of justice. The fact that he lied for what he thought was a good reason does not obscure the fact that he lied.”<sup>68</sup> The court additionally held, “[t]o the extent Pautler's misconduct perpetuates the public's misperception of our profession, he breached public and professional trust.”<sup>69</sup> Pautler's sanctions included a suspension for three months that was stayed during twelve months probation and the requirement to fulfill various conditions, including retaking the MPRE.<sup>70</sup>

Several people from the community applauded Pautler's use of deceit calling it a “white lie” and considered Pautler to be a hero for his actions.<sup>71</sup>

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1177–78.

65. *Id.* at 1178.

66. *Id.* at 1179 (quoting COLO. CODE OF PROF'L CONDUCT R. 8.4(c) (2002)).

67. *Id.* at 1183.

68. *Id.*

69. *Id.*

70. *Id.* at 1182.

71. Cross, *supra* note 47, at 224 (citing various newspaper editorials and even

Many have also written on how an exception for Rule 8.4(c) should be made to allow the use of deception in situations like the one found in this case.<sup>72</sup> This is the extreme situation, however, and as the old adage says: “bad facts make bad law.”<sup>73</sup> The court in this case came to the right conclusion. If the profession is to be respected, there should not be an exception to the rule that a lawyer must be honest because “no single transgression reflects more negatively on the legal profession than a lie.”<sup>74</sup>

### B. *Justification for the Use of Deception in Private Practice*

Courts grant police officers and other governmental agents great leeway in the use of deceptive practices in the investigative process.<sup>75</sup> In turn, many private practicing attorneys feel they can be dishonest or use deception if they can make the argument that the ends justify the means.<sup>76</sup> An example of how deception for the greater good has now become the argument in favor of the use of deception in private practice is the *In re Gatti* case.<sup>77</sup>

In *Gatti*, the Supreme Court of Oregon upheld a decision by the Oregon Disciplinary Board with regards to Gatti’s violation of Oregon’s Code of Professional Responsibility Disciplinary Rule 1-102(A)(3).<sup>78</sup>

Gatti was an attorney in Oregon who represented various

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an article in the National Law Journal as examples).

72. See *id.* at 234; Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 606 (2005); 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, 308 (2004); Shine, *supra* note 40, at 749–50.

73. *Doggett v. United States*, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting) (internal quotations omitted).

74. Richmond, *supra* note 72, at 578 (internal quotations omitted).

75. Shine, *supra* note 40, at 727.

76. See, e.g., *In re Gatti*, 8 P.3d 966, 974 (Or. 2000) (the accused attorney argued that an exception that would excuse misrepresentations made solely for the purposes of discovering information was “necessary if lawyers in private practice, like their counterparts in the government, are to be successful in their efforts to ‘root out evil’”).

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

78. *Id.* at 968–69. The Code of Professional Responsibility Disciplinary Rule 1-102(A)(3) mirrors the ABA Model Rules of Professional Conduct Rule 8.4(c), which reads: “It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2006).

chiropractors.<sup>79</sup> In 1994, a chiropractor acquaintance informed Gatti that he was contacted by Comprehensive Medical Review (CMR), who was working for State Farm Insurance Company and was responsible for reviewing whether State Farm should accept or deny medical claims.<sup>80</sup> This acquaintance had expressed his sense of “unease” about the way in which CMR was conducting its reviews.<sup>81</sup> Gatti “subsequently came to believe that individuals other than medically trained personnel were preparing reports for CMR, that they were using a ‘formula’ designed to help State Farm contain costs, and that medical reviewers were signing the reports.”<sup>82</sup> One such report that upset Gatti was signed by a Dr. Becker, who was a chiropractor practicing in California.<sup>83</sup> To investigate, Gatti called Dr. Becker misrepresenting himself as a chiropractor in order to find out about Becker’s qualifications, to which Becker became uncomfortable and discontinued the conversation.<sup>84</sup> Unsuccessful in getting the desired information, Gatti phoned CMR introducing himself as a doctor experienced in reviewing insurance claims.<sup>85</sup> By doing so, Gatti hoped to obtain information that he could use to his advantage in claims against CMR for fraud.<sup>86</sup> Gatti defended this use of deception by arguing that there should be an investigatory exception to the rules of professional conduct and proposed that the rule state: “[a]s long as misrepresentations are limited only to identity or purpose and [are] made solely for purposes of discovering information, there is no violation of the Code of Professional Responsibility.”<sup>87</sup> Gatti further argued: “such an exception is necessary if lawyers in private practice, like their counterparts in the government, are to be successful in their efforts to ‘root out evil.’”<sup>88</sup>

During the *Gatti* proceedings, a variety of civil rights groups filed amicus briefs seeking to extend the traditional public lawyer exception to private lawyers, “on the ground that public policy should favor rather than prohibit legitimate attempts to root out fraud and illegal discrimination.”<sup>89</sup>

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79. *Gatti*, 8 P.3d at 969.

80. *Id.* at 969–70.

81. *Id.* at 970.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See id.* at 973.

87. *Id.* at 974.

88. *Id.*

89. Hodes, *supra* note 55, at 76–77.

After the Supreme Court of Oregon rejected those pleas, it made mention that it was open to reconsideration on the issue in a later rulemaking proceeding.<sup>90</sup> In response to an outcry by the law enforcement community in Oregon, the Oregon Supreme Court completely overhauled its disciplinary rules as follows:

[I]t shall not be professional misconduct for a lawyer 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 disciplinary rules. "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.<sup>91</sup>

Although a lawyer, public or private, will not be allowed to abuse this rule, "the trigger of 'good faith belief' is not overly demanding" and will not be difficult to meet.<sup>92</sup> The decision to adopt this exception to both private and public practicing lawyers opens the proverbial flood gates to a sea of dishonesty and will only serve to further hinder the public's admiration of the legal community.

#### V. THE IOWA CODE OF PROFESSIONAL CONDUCT'S EXCEPTION TO THE USE OF DISHONESTY, FRAUD, DECEIT, AND MISREPRESENTATION

The ABA Model Rules of Professional Conduct dictate that it is professional misconduct if a lawyer "engage[s] in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>93</sup> This rule was included in the proposed Iowa Rules of Professional Conduct and was adopted by the Supreme Court of Iowa in 2002.<sup>94</sup> This rule has its root in Iowa, when in 1983, the Iowa State Bar Association proposed to amend Rule 8.4 on Misconduct by adding paragraph (c).<sup>95</sup> This paragraph was proposed by

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90. *Id.* at 77.

91. OR. CODE OF PROF'L RESPONSIBILITY DR 1-102(D) (2002).

92. Hodes, *supra* note 55, at 79.

93. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2006).

94. IOWA RULES OF PROF'L CONDUCT R. 32:8.4(c) (2006).

95. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 809 (2006).

the Iowa State Bar Association in an effort to preserve the standards that previously existed under Disciplinary Rule 1-102(A).<sup>96</sup> The Iowa Rules of Professional Conduct Drafting Committee was completing its report of proposed rules to the Iowa Supreme Court in 2002 when several instances questioned the scope of Rule 8.4(c).<sup>97</sup> The first such instance was the *Gatti* case.<sup>98</sup> The second instance was *Apple Corps Ltd. v. International Collectors Society*.<sup>99</sup> The third and final instance came from an ethics opinion from Utah.<sup>100</sup>

In *Apple Corps*, private attorneys used deception by posing as consumers to investigate the suspected violation of a consent order.<sup>101</sup> The court found that the attorney's use of such tactics was not a violation of Rule 8.4(c) of the New Jersey Rules of Professional Conduct.<sup>102</sup> The court stated "[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>103</sup>

The Utah Ethics Advisory Committee looked at the ethical considerations for a governmental lawyer who participates in a lawful covert governmental operation, such as an investigation or an intelligence-gathering activity.<sup>104</sup> The Committee 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."<sup>105</sup> The committee stated that Rule 8.4(c) was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful covert activities.<sup>106</sup>

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96. *Id.* at 809, 812.

97. GREGORY C. SISK & MARK S. CADY, 16 IOWA PRACTICE SERIES: LAWYER AND JUDICIAL ETHICS 1092-93 (2007).

98. *See* discussion *supra* Part IV.B.

99. SISK & CADY, *supra* note 97, at 1092 (citing *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D. N.J. 1998)).

100. *Id.* at 1093.

101. *Apple Corps Ltd.*, 15 F. Supp. 2d at 462, 471.

102. *Id.* at 475 (citing N.J. RULES OF PROF'L CONDUCT R. 8.4(c), which is identical to IOWA RULES OF PROF'L CONDUCT R. 32:8.4(c)).

103. *Id.*

104. Utah Ethics Advisory Opinion No. 02-05 (Mar. 18, 2002).

105. *Id.*

106. *Id.*

The committee found, however, that they could not throw a cloak of approval over all lawyer conduct associated with an undercover investigator.<sup>107</sup> Furthermore, the committee specifically reserved the issue of whether the analysis and result of their opinion applied to a private lawyer's investigative conduct involving dishonesty, fraud, misrepresentation or deceit.<sup>108</sup>

The Iowa Rules of Professional Conduct Drafting Committee found the analysis of these cases to be persuasive and supplemented their proposed rules submission to the Iowa Supreme Court to include language in the comments of Rule 8.4 in order to "(1) foreclose even the possibility of an unjustified complaint about legitimate covert investigations of suspected violations of the law, and (2) provide guidance to government and other lawyers about the proper bounds of those covert investigations."<sup>109</sup> As a result, the Iowa Supreme Court adopted comment 6 to Rule 8.4(c)<sup>110</sup> which reads:

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.<sup>111</sup>

This mirrors the exception that was adopted by the Oregon Supreme Court in response to the *Gatti* case.<sup>112</sup> This exception is misplaced.

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107.      *Id.*

108.      *Id.* at n.1.

109.      SISK & CADY, *supra* note 97, at 1093.

110.      *Id.*

111.      IOWA RULES OF PROF'L CONDUCT R. 32:8.4(c) cmt. 6 (2006).

112.      See OR. CODE OF PROF'L RESPONSIBILITY DR 1-102(D) (2003).

Apply, for example, the Hewlett-Packard scandal to this exception. It could be argued that Patricia Dunn and Hewlett-Packard's corporate counsel believed that they were acting ethically because the end of not being exposed to federal securities liability was necessary and the only way to accomplish this was by the use of these deceptive means. Prior to the enactment of the Telephone Records and Privacy Protection Act of 2006, the use of pretexting to obtain phone records was legal,<sup>113</sup> and thus an argument could be made that this was not professional misconduct according to comment 6 to Rule 8.4(c) of the Iowa Rules of Professional Conduct. Under this comment, Hewlett-Packard's lawyers could also contend that they had a good faith belief that unlawful activity, in this case a violation of securities laws, would take place in the foreseeable future. They could further argue that they only resorted to the use of subterfuge as a last resort, and only because previous investigations failed to yield results. This is a clear example of how the exception to honesty, as adopted by the Iowa Supreme Court, is misplaced and can be taken advantage of. It is disappointing that a situation that produced such a public outcry may have been seen as ethical in Iowa.

The Hewlett-Packard example demonstrates how this exception may lead to the use of misrepresentation in covert investigations. The Iowa Rules of Professional Conduct set a dangerous precedent and create yet another unnecessary gray area in ethics. The Iowa Supreme Court erred in adopting this "lying with an explanation"<sup>114</sup> exception to the rule. One ethics scholar has said that the Oregon exception, which mirrors the Iowa exception, "corrected course too dramatically."<sup>115</sup> "Moreover, although the exception will not be allowed to those who attempt to abuse it, the trigger of 'good faith belief' is not overly demanding, and is itself often difficult to apply."<sup>116</sup> While some information may only be obtained through the use of deception, the ends are too dangerous to justify the means.

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113. See Michael A. Hiltzik, *State's HP Case May Be Tough to Win*, L.A. TIMES, Sept. 15, 2006, at C1 ("There's a mix of halfway laws on the subject," and "privacy advocates say pretexting will be hard to stamp out until it is targeted by specific measures").

114. Hodes, *supra* note 55, at 72.

115. *Id.* at 78.

116. *Id.* at 79.



## VI. CONCLUSION

“There is no more fundamental ethical value than honesty. We associate honesty with people of honor, and we admire and rely on those who are honest.”<sup>117</sup> If lawyers are allowed to be dishonest, on whom can the public rely to provide them with counsel? “Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest.”<sup>118</sup> The legal system and the profession can ill afford the use of any dishonest or deceptive means to gather information.

The Iowa Supreme Court has entered into dangerous territory by adopting an exception to the Rules of Professional Conduct that allows both public and private attorneys to lie, deceive, and misrepresent themselves if they have a good faith belief that a violation of the law has taken or will take place.<sup>119</sup> This exception clouds attorneys’ minds with ideas that if they can come up with a good explanation then it is okay. This is disconcerting because “no single transgression reflects more negatively on the legal profession than a lie.”<sup>120</sup>

As illustrated in the situations presented in this Note, lawyers rationalize unethical behavior by simply stating that the end justifies the means. As guardians of the law, lawyers play a vital role in the preservation of society. With this role comes the responsibility to act in accordance with the highest standards of ethical conduct.<sup>121</sup> This responsibility, unlike the law, is unchanging. If lawyers abide by honest practices, even when confronted with difficult situations, the profession can gain back the public’s confidence and respect, and subsequently not have to ever again hear the question: “Where were the lawyers?”

*David J. Dance\**

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117. MICHAEL JOSEPHSON, MAKING ETHICAL DECISIONS 8 (Wes Hanson ed., 2002).

118. *In re Pautler*, 47 P.3d 1175, 1179 (Colo. 2002).

119. IOWA RULES OF PROF’L CONDUCT R. 32:8.4(c) cmt. 6 (2006).

120. Richmond, *supra* note 72, at 578 (quoting *In re Kalil*, 773 A.2d 647, 648 (N.H. 2001)).

121. *Pautler*, 47 P.3d at 1178.

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