

# The Truth be Told: The Need for a Model Rule Defining a Lawyer’s Duty of Candor to a Client

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## I. INTRODUCTION

Lying has its benefits. As Justice Stephen Breyer observed, false statements can serve useful personal, social, public, philosophical, and scientific objectives.<sup>1</sup> But, even assuming that deception is advantageous in certain circumstances, it is

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1. *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring) (“False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates’ methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.”).

doubtful that Justice Breyer would countenance a lawyer knowingly presenting false information to the Court. Nor should he. Even zealous advocates “must draw the line at lying.”<sup>2</sup> Accordingly, Rule 3.3 of the ABA Model Rules of Professional Conduct (“Model Rules”) specifically prohibits a lawyer from knowingly making a false statement of law or fact to a tribunal.<sup>3</sup>

But the Model Rules go further in demanding truthfulness by lawyers. Rule 4.1 bars a lawyer from making a false statement of material fact to a third person in connection with the representation of a client.<sup>4</sup> The Model Rules further define a lawyer’s duty of candor: (1) to attorney admission and disciplinary boards;<sup>5</sup> (2) to former jurors;<sup>6</sup> (3) in advertisements and solicitations;<sup>7</sup> and (4) when commenting upon a judge’s or judicial candidate’s integrity or qualifications for office.<sup>8</sup> The Model Rules protect just about everyone a lawyer might communicate with in a professional capacity—oh yes, except for clients. Surprisingly, there is no Model Rule establishing and defining a lawyer’s duty of candor to a client. Furthermore, the ABA does not explain why the long-standing fiduciary duty of “absolute and perfect candor, openness and honesty” toward a client finds no expression in the rules governing the legal profession. Is this omission merely an oversight? Or is it an admission of the need to deceive clients on occasion?

This Essay briefly surveys the genesis and content of the Model Rules defining a lawyer’s duty of truthfulness to the court, third parties, and the public. Next, the Essay examines possible explanations for the absence of a Model Rule declaring a duty of candor to clients. Finally, the Essay proposes a new rule requiring truthful communications by lawyers to their clients.

## II. THE DUTY OF CANDOR TO THE COURT

A lawyer’s duty to scrupulously avoid the presentation of false information to the court was embodied in the first English statute regulating the legal profession. Enacted by Parliament in 1275, the First Statute of Westminster provided that a lawyer who perpetrated or consented to any “Deceit or Collusion in the King’s Court” would be imprisoned for a year and a day and barred from further court appearances.<sup>9</sup>

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2. 2 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 37.2, at 37-3 (3d ed. Supp. 2004).

3. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2013) (“A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . .”).

4. *Id.* R. 4.1(a).

5. *Id.* R. 8.1.

6. *Id.* R. 3.5(c)(3).

7. *Id.* R. 7.1.

8. *Id.* R. 8.2(a).

9. Statute of Westminster I, 1275, 3 Edw. 1, c. 29 (Eng.); *see also* Amalfitano v. Rosenberg, 903 N.E.2d 265, 267 (N.Y. 2009) (quoting Statute of Westminster I, 1275, 3 Edw. 1, c. 29 (Eng.)).

In 1402, Parliament required members of the legal profession to take an oath to “well and truly . . . serve in their Offices.”<sup>10</sup> The statute required no particular form of oath, but the oath commonly known as the “do no falsehood” oath was typical in England and later in the American colonies.<sup>11</sup> Picking up where the First Statute of Westminster left off, the “do no falsehood” oath began as follows: “You shall doe noe Falsehood nor consent to anie to be done in the Office of Pleas of this Courte wherein you are admitted an Attorney.”<sup>12</sup>

Like their English counterparts, American courts emphasized the essential nature of a lawyer’s obligation of candor to a tribunal:

[The lawyer] is an officer of the court,—a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception, or permits his clients to do so.<sup>13</sup>

Because it is deeply embedded as a fundamental obligation, the duty of candor to the court has taken center stage in each ABA model professional code for lawyers. Canon 22 of the ABA Canons of Professional Ethics adopted in 1908 (“1908 Canons”) required “candor and fairness” in all dealings with the court.<sup>14</sup> In 1969, the ABA enacted Disciplinary Rule 7-102(A) as part of the Model Code of Professional Responsibility (“Model Code”) which likewise prohibited a lawyer from: (1) “[k]nowingly us[ing] perjured testimony or false evidence;” and (2) “[k]nowingly mak[ing] a false statement of law or fact” to a judge.<sup>15</sup>

Today, Rule 3.3(a) of the Model Rules requires absolute candor by directing that a lawyer refrain from knowingly offering false evidence or knowingly making a false statement to a judge or other adjudicatory officer.<sup>16</sup> The rule applies regardless of the materiality of the false statement or evidence.<sup>17</sup> So, even though some lies might, in the words of Justice Breyer, “serve useful human objectives,”<sup>18</sup>

10. 1402, 4 Hen. 4, c. 18 (Eng.), reprinted in Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 app. VII, at 135 (1998).

11. See Raymond J. McKoski, *Prospective Perjury by a Criminal Defendant: It's All About the Lawyer*, 44 ARIZ. ST. L.J. 1575, 1583–86 (2012).

12. *Id.* at 1583 (quoting JOSIAH HENRY BENTON, THE LAWYER’S OFFICIAL OATH AND OFFICE 28 (1909)).

13. *People ex rel. Att’y Gen. v. Beattie*, 27 N.E. 1096, 1103 (Ill. 1891).

14. CANONS OF PROF’L ETHICS Canon 22 (1908).

15. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(4)–(5) (1980).

16. MODEL RULES OF PROF’L CONDUCT R. 3.3(a) (2013).

17. See *In re Winter*, 770 N.W.2d 463, 467 (Minn. 2009) (stating that the obligation to be truthful to the court does not depend on the materiality of the statement made by the lawyer); ANNOTATED MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) annot. at 311 (6th ed. 2007) (“Rule 3.3(a)(1) prohibits a lawyer from knowingly misstating anything to a tribunal, whether material or not, whether fact or law, whether in writing or not, and whether in an affidavit, a report, a pleading, or other document.”). Prior to its amendment in 2002, Model Rule 3.3(a)(1) required that “[a] lawyer shall not knowingly: . . . make a false statement of *material* fact or law to a tribunal.” MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (1983) (emphasis added).

18. See *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring).

those same lies would violate Rule 3.3(a). For example, a false claim of car trouble might serve a useful personal objective in explaining a spouse's late arrival for dinner. But using the same false excuse to explain a tardy arrival to court would subject a lawyer to discipline.<sup>19</sup>

### III. THE DUTY OF CANDOR TO THIRD PERSONS

The duty of candor to adverse parties, witnesses, and attorneys has a long history in formal codes of professional conduct. The Alabama Code of Ethics, promulgated in 1887, dictated that “[t]he utmost candor and fairness should characterize the dealings of attorneys . . . with each other,”<sup>20</sup> and that “[w]itnesses and suitors should be treated with fairness and kindness.”<sup>21</sup> The 1908 Canons endorsed these same principles. Canon 18 made lawyers ethically obligated to treat adverse witnesses and suitors with candor.<sup>22</sup> Similarly, Canon 22 mandated candor by attorneys in dealing with each other.<sup>23</sup> Later, the Model Code followed suit.<sup>24</sup>

Model Rule 4.1(a) refines this long-standing obligation. It provides that “[i]n 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.”<sup>25</sup> This duty to avoid material misrepresentations extends to everyone counsel deals with on a client's behalf, but does not include statements made by an attorney to a client.<sup>26</sup>

### IV. THE DUTY OF CANDOR TO THE PUBLIC

As demonstrated in Parts II and III, the Model Rules prohibit a lawyer from lying to the court on any matter and prohibit a lawyer from lying on a material matter to others whom the lawyer encounters during the course of representing a client. The Model Rules also obligate lawyers to tell the truth in many public statements unrelated to court proceedings or the representation of a client.

#### A. TRUTH IN ADVERTISING

In the nineteenth century, lawyers advertised their services in newspapers, pamphlets, magazines, and lawyer listings.<sup>27</sup> At least until the late 1800s, the

19. Cf. *Baker v. State ex rel. Johnson*, 15 S.E. 788, 792 (Ga. 1892) (disciplining a lawyer for obtaining a continuance by misleading the court).

20. ALA. CODE OF ETHICS § 5 (1887).

21. *Id.* § 53.

22. CANONS OF PROF'L ETHICS Canon 18 (1908).

23. *Id.* Canon 22.

24. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (1980).

25. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2013).

26. *State ex rel. Okla. Bar Ass'n v. Bolusky*, 23 P.3d 268, 275 (Okla. 2001) (“Rule 4.1 involves making a statement to a ‘third person’, that is, someone other than the client.”); D.C. RULES OF PROF'L CONDUCT R. 4.1 cmt. 1 (Supp. 2010) (stating that the term “third person” in Rule 4.1 does not include an attorney's client); ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 4.1 annot. at 384 (6th ed. 2007) (“Rule 4.1 is not applicable to what a lawyer says to a client.”).

27. See James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 2008 J. PROF. LAW. 235, 322 n.484 (“Lawyer advertising was common in the nineteenth century.”); Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should be Allowed to Advertise: A Market*

advertisements were generally dignified, brief, and verifiable, usually including the lawyer's name, address, and availability. For example, in 1837, future United States Supreme Court Justice David Davis announced the relocation of his law office to Bloomington, Illinois, in the following newspaper advertisement:

David Davis  
Attorney and Counsellor at Law

having removed from Pekin to Bloomington, McLean County, will hereafter practice in the Circuit Courts of McLean, Macon & Tazewell counties. Notes and accounts entrusted to him for collection in any part of the State will be strictly attended to. Office on Front Street with J.W. Fell, Esq., one door East of Moore & Thaw's Store.<sup>28</sup>

As the number of lawyers increased and the competition for clients intensified, advertisements became less dignified and less truthful. The courts, however, did not stand for the sully of the profession by advertisements that stooped to "wiles and arts and contrivances" to attract clients.<sup>29</sup> For example, attorney Alfonzo Goodrich published numerous newspaper advertisements claiming that he could obtain divorces in Illinois "for incompatibility" and "without publicity," and claimed "[r]esidence unnecessary."<sup>30</sup> The Illinois Supreme Court found the announcements to be knowingly false because a divorce could not be obtained without residency and publicity and because incompatibility was not a ground for divorce in Illinois.<sup>31</sup> The court disbarred Mr. Goodrich for his "shameless effrontery," "disgusting artifices," and "libel on those courts" in publishing "false and fraudulent advertisements of his capabilities."<sup>32</sup>

The issue of false advertising became moot when the ABA adopted the 1908 Canons. Canon 27 permitted the use of business cards but prohibited the solicitation of clients "by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations."<sup>33</sup> In 1937, the ABA relented slightly, amending Canon 27 to permit lawyers to include biographical information in an approved law list or law directory.<sup>34</sup> Three years later, the ABA added the requirement that the "data" in the lawyer's biography must not be misleading.<sup>35</sup> In other words, the candor required by Canon 27

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*Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1084-85 n.2 (1983) ("Prior to the twentieth century, lawyer advertising was generally considered acceptable.").

28. WILLARD L. KING, *LINCOLN'S MANAGER: DAVID DAVIS* 28 (1960).

29. *People ex rel. Moses v. Goodrich*, 79 Ill. 148, 152 (1875).

30. *Id.* at 149-50.

31. *Id.* at 150.

32. *Id.* at 152-53.

33. CANONS OF PROF'L ETHICS Canon 27 (1908).

34. CANONS OF PROF'L ETHICS Canon 27 (1937).

35. CANONS OF PROF'L ETHICS Canon 27 (1940).

mandated that the lawyer's "listing shall tell the truth, the whole truth, and nothing but the truth."<sup>36</sup>

Today, Model Rule 7.1 continues the tradition of protecting the general public from deceptive lawyer advertising by prohibiting "false or misleading communication about the lawyer or the lawyer's services."<sup>37</sup> This rule encompasses "material misrepresentation[s] of fact or law" and omissions causing an otherwise true statement or claim to become materially misleading.<sup>38</sup>

#### B. FALSE STATEMENTS ABOUT JUDGES

Another component of a lawyer's duty of candor to the public is the obligation to express "honest and candid opinions" when discussing the performance of judges and public legal officers such as public defenders and attorneys general.<sup>39</sup> Rule 8.2 prohibits a lawyer from knowingly or recklessly making a false statement "concerning the qualifications or integrity of a judge" or candidate for judicial office.<sup>40</sup> The rule is not designed to protect the "delicate sensibilities" of judges, but to preserve respect for the judiciary.<sup>41</sup> Lawyers possess unique knowledge about judges and the workings of the judicial system; therefore, the public affords great weight to their criticisms.<sup>42</sup> This extra credibility benefits the legal system when a lawyer's comments are well founded, but it needlessly diminishes public respect for judges when the comments are unfounded or false. As a result, lawyers violate their duty of candor to the public if they falsely claim that a judge extorted money,<sup>43</sup> improperly delayed a decision,<sup>44</sup> or ruled only "to curry favor with constituents."<sup>45</sup>

It is especially noteworthy that Rule 8.2 also proscribes falsely impugning the integrity of a judge's decision in a private conversation with a client, not because the lawyer is lying to the client but because the lawyer has led a member of the public to erroneously believe that the judge lacks impartiality.<sup>46</sup>

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36. HENRY S. DRINKER, LEGAL ETHICS app. A, at 291 (1953) (quoting ABA Decision 159, an unpublished decision of the ABA Ethics Committee) (internal quotation marks omitted).

37. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2013).

38. *See id.*

39. *Id.* R. 8.2 cmt. 1.

40. *Id.* R. 8.2(a).

41. Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 183 (Ky. 1996).

42. *See Ex parte Steinman*, 95 Pa. 220, 238–39 (1880) (observing that lawyers have the best opportunity to evaluate judicial behavior); Angela Butcher & Scott Macbeth, *Lawyers' Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. LEGAL ETHICS 659, 673–74 (2004).

43. Notopoulos v. Statewide Grievance Comm., 890 A.2d 509, 516–18 (Conn. 2006).

44. *In re Russell*, 797 N.W.2d 77, 89 (S.D. 2011).

45. Harroun v. Addison Police Pension Bd., 865 N.E.2d 273, 279 (Ill. App. Ct. 2007).

46. *See Bd. of Prof'l Responsibility v. Davidson*, 205 P.3d 1008, 1016 (Wyo. 2009) ("By baselessly impugning the integrity of a sitting judge, Respondent encouraged her client to believe that the judicial system was unfair and partial.")

## V. THE DUTY OF CANDOR TO A CLIENT

Fiduciary obligations are at the heart of the attorney-client relationship.<sup>47</sup> Every American jurisdiction recognizes the basic duties attendant to this special relationship, including the duties of candor and honesty toward a client.<sup>48</sup> But it is not merely run-of-the-mill honesty and candor that this “sacred” association mandates.<sup>49</sup> Rather, a lawyer owes a client the “utmost” and “highest” degree of honesty,<sup>50</sup> and “absolute and perfect candor, [and] openness.”<sup>51</sup> So, how is this long-standing, universally accepted duty of complete honesty and candor to a client integrated into the Model Rules of Professional Conduct? The answer is simple: It isn't. The Model Rules do not include a single provision declaring or defining a lawyer's duty of truthfulness to a client comparable to the rules defining the lawyer's duty of candor to other participants in the legal system. At best, the Model Rules pick around the edges of the issue.

Model Rule 1.4, which sets forth a lawyer's duty to reasonably and effectively communicate with a client, would be the natural place to impose a requirement that those communications be truthful. But neither Rule 1.4 nor the comments to the rule mention honesty, candor, or truthfulness.<sup>52</sup> The rule seems to imply some level of truthfulness because it authorizes the use of deception under certain circumstances. In particular, Comment 7 to Rule 1.4 allows a lawyer to temporarily withhold information from a client if the information would likely cause the client to act “imprudently.”<sup>53</sup> To illustrate the application of this provision, the comment explains that a lawyer might withhold a psychiatric diagnosis from a client if the diagnosing psychiatrist believed that disclosure

47. See 2 RONALD E. MALLIN ET AL., *LEGAL MALPRACTICE* § 15:1 (2014) (“The fiduciary obligations are the foundation of the attorney-client relationship.”); Sande Buhai, *Lawyers as Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 553 (2009) (“Lawyers are, first and foremost, fiduciaries.”).

48. See 2 MALLIN ET AL., *supra* note 47, § 15:1.

49. *Hannon v. State*, 266 So. 2d 825, 829 (Ala. Crim. App. 1972) (“The relationship of attorney and client is one of the most sacred relationships known to the law . . .”).

50. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992) (stating that a lawyer must exercise and maintain the “utmost good faith, honesty, integrity, fairness and fidelity” in dealing with a client (quoting *Haft v. Farkas*, 498 F.2d 587, 589 (2d Cir.1974))); see also *Gagne v. Vaccaro*, 766 A.2d 416, 425 n.14 (Conn. 2001) (“An attorney is rightly held to the highest degree of honesty and loyalty to his client . . .” (quoting *McKnight v. Gizze*, 175 A. 676, 678 (Conn. 1934))); *Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812, 820 (Iowa 2007) (“The relationship between a client and an attorney . . . [is] one of [t]he most abundant good faith; absolute and perfect candor or *openness* and honesty; the *absence of any concealment* or deception, however slight.” (alterations in original) (internal quotation marks omitted)); *U.S. Ice Cream Corp. v. Bizar*, 659 N.Y.S.2d 492, 493 (App. Div. 1997) (“As a fiduciary, the lawyer is obliged to exercise the highest degree of good faith, honesty, integrity, fairness, and fidelity [toward a client] . . .”).

51. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App. 1992) (“Specifically, the relationship between attorney and client has been described . . . [as] requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.”); see also *Disciplinary Counsel v. Smigelski*, 4 A.3d 336, 342 (Conn. App. Ct. 2010) (“[T]he fiduciary relationship between an attorney and a client requires absolute perfect candor, openness and honesty, and the absence of any concealment or deception.” (internal quotation marks omitted)).

52. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2013).

53. *Id.* R. 1.4 cmt. 7.

would harm the client.<sup>54</sup> Thus, it appears that Rule 1.4 would excuse a lawyer's lie in response to a question from a client asking whether the client's psychiatrist has formed a diagnosis. In effect, Comment 7 carves out an exception to an implied general rule of truthful, honest, and open communication with a client. That unstated general rule needs expression in Rule 1.4.

Similarly, Rule 2.1 picks around the edges of an attorney's duty of candor to a client. Rule 2.1 states that when acting in the role of advisor, a lawyer "shall exercise independent professional judgment and render candid advice."<sup>55</sup> Why the Model Rules specifically require candor in communications with a client when a lawyer acts as an advisor—but not when a lawyer acts as an advocate, negotiator, or evaluator—is unclear.<sup>56</sup> Most likely, the mention of candor in Rule 2.1 serves to reassure lawyers that they should not shy away from recommending a particular course of action because the advice might be unpalatable to a client.<sup>57</sup> Furthermore, Rule 2.1 only ensures candor in statements constituting advice and leaves unprotected all other communications between advising lawyers and their clients.

#### VI. EXPLAINING THE ABSENCE OF A MODEL RULE DEFINING A LAWYER'S DUTY OF CANDOR TO A CLIENT

What could explain the absence of a Model Rule defining the duty of candor to a client? One possibility is that the duty of absolute and perfect candor toward a client is so well engrained in the attorney-client relationship and so well accepted by the legal profession that no rule is necessary.<sup>58</sup> But that explanation rings hollow since the well engrained and accepted duty of candor to the tribunal finds expression in Rule 3.3; the long-standing duty of candor to adversaries is stated in Rule 4.1; and the Model Rules reaffirm other obvious legal and ethical duties of a lawyer, including the duty of professional competence,<sup>59</sup> the duty to charge reasonable fees,<sup>60</sup> and the duty not to bribe a judge<sup>61</sup> or present frivolous claims.<sup>62</sup> Another explanation could be that there is no lack of candor between lawyers and

54. *Id.*

55. *Id.* R. 2.1.

56. *See id.* Preamble para. 2 (describing a lawyer's functions in representing a client as advisor, advocate, negotiator, and evaluator).

57. *Id.* R. 2.1 cmt. 1. Comment 1 explains that in order to maintain a client's "morale" a lawyer may put disheartening advice "in as acceptable a form as honesty permits," but should not fail to give candid advice just because a client will find it "unpalatable." *Id.*

58. *Cf.* ABA Comm. on Prof's Ethics & Grievances, Formal Op. 81 (1932) (implying that the Canons of Professional Ethics omitted any provision barring attorney misrepresentations because everyone knows that misrepresentation is a "cardinal professional sin").

59. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

60. *Id.* R. 1.5(a).

61. *Id.* R. 3.5(a) ("A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law . . .").

62. *Id.* R. 3.1.

clients that a rule would need to address. Unfortunately, this is not the case since lawyers all too often lie to their clientele.<sup>63</sup>

A third possibility is that lying to clients is prohibited by Rule 8.4(c), which bars a lawyer from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation,” so a separate rule defining a lawyer’s duty of candor to a client is unnecessary.<sup>64</sup> But this explanation is equally unconvincing. The all-purpose Rule 8.4(c) also prohibits dishonesty, fraud, deceit, and misrepresentation toward a tribunal,<sup>65</sup> bar admission and disciplinary bodies,<sup>66</sup> litigation adversaries,<sup>67</sup> recipients of lawyer advertising,<sup>68</sup> and jurors,<sup>69</sup> all of whom are protected by separate and specific rules ensuring attorney candor.<sup>70</sup>

Most likely, the failure of the Model Rules to impose a duty of candor in client communications rests on the profession’s uncertainty as to what degree of honesty should be required of attorneys in communicating with their clients. Should the standard be absolute truthfulness, patterned after the duty not to make a false statement, regardless of materiality, to the court?<sup>71</sup> Or should the standard be less demanding, patterned after the duty of candor to third persons, which only prohibits false material statements?<sup>72</sup> The dilemma is obvious. The standard of

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63. See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 663 (1990) (“Lawyers deceive their clients more than is generally acknowledged by the ethics codes or by the bar.”); see also *id.* at 703–43 (detailing lawyers’ deception toward clients to impress clients, inflate bills, impress partners, control workload, and for personal convenience).

64. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2013). Dishonesty, fraud, deceit, and misrepresentation are not synonymous. See *In re Starr*, 952 P.2d 1017, 1026 (Or. 1998) (en banc) (“[F]raud, deceit, dishonesty, and misrepresentation overlap but are not identical concepts.”).

65. See ANNOTATED MODEL RULES OF PROF’L CONDUCT R. 8.4(c) annot. at 585 (6th ed. 2007) (“In addition to Rule 3.3, which directly deals with candor toward tribunals, Rule 8.4(c) is implicated when a lawyer misleads or lies to a tribunal.”).

66. See *People v. Hassan*, 45 P.3d 1283, 1291 (Colo. O.P.D.J. 2002) (finding that the submission of false documents to the Office of Attorney Registration Counsel violated Rules 8.1(a) and 8.4(c)); *In re Verma*, 691 N.E.2d 1211, 1213 (Ind. 1998) (finding that a lawyer violated Rule 8.1(a) and Rule 8.4(c) by making false statements of material fact in applications for admission to practice law in Maryland and Pennsylvania).

67. See ANNOTATED MODEL RULES OF PROF’L CONDUCT R. 8.4(c) annot. at 586 (6th ed. 2007) (“A lawyer can violate Rule 8.4(c) by deceiving an adverse party or opposing counsel.”).

68. See *In re Cole*, 738 N.E.2d 1035, 1037 (Ind. 2000) (finding that misleading advertisements violate Rule 7.1 and Rule 8.4(c)); *In re Weaver*, 281 P.3d 502, 522 (Kan. 2012) (stating that misleading advertisements violate Rule 8.4(c)).

69. See *In re Allen*, 783 N.E.2d 1118, 1119–20 (Ind. 2002) (finding that a lawyer violated Rule 8.4(c) by erroneously advising prospective jurors that he did not practice criminal law).

70. MODEL RULES OF PROF’L CONDUCT R. 8.1(a) (2013) (admonishing lawyers not to “make a false statement of material fact” in connection with their own or another’s bar admission application or disciplinary proceeding); *id.* R. 3.5(c)(3) (prohibiting misleading communications with a discharged juror); see also ANNOTATED MODEL RULES OF PROF’L CONDUCT R. 8.4(c) annot. at 586 (6th ed. 2007) (“Deceiving anyone—not just a client or tribunal—can subject a lawyer to discipline under Rule 8.4(c.”); *Douglas’ Case*, 937 A.2d 891, 897 (N.H. 2007) (“A basic premise of Rule 8.4(c) is that a lawyer may not make misrepresentations to a client, tribunal, or others.” (quoting ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT § 101:402 (1998)) (internal quotation marks omitted)).

71. See *supra* Part II.

72. See *supra* Part III.

absolute truthfulness would bar inconsequential lies to clients like “the complaint is prepared, but I left it at home,” or “sorry I’m late—car trouble again.” These little white lies, many lawyers would argue, do absolutely no harm and are simply unavoidable in human interaction. At the same time, however, the legal profession is not anxious to announce a rule that, in effect, authorizes lawyers to lie about what they deem to be unimportant matters. A rule granting permission to lie about immaterial matters would not only contradict the fiduciary duty of absolute truthfulness but would also serve to reinforce the public’s mindset that lawyers are deceitful.<sup>73</sup> To avoid this choice between two unacceptable alternatives, the drafters of the Model Rules chose to “treat lying to clients as a nonissue.”<sup>74</sup>

## VII. A PROPOSED MODEL RULE

Recognizing the legal system’s dependence on lawyer honesty and truthfulness, the Iowa Supreme Court observed:

Fundamental honesty is the base line and mandatory requirement to serve in the legal profession. The whole structure of ethical standards is derived from the paramount need for lawyers to be trustworthy. The court system and the public we serve are damaged when our officers play fast and loose with the truth.<sup>75</sup>

To protect this interest in candor, rules of professional conduct impose standards of truthfulness on attorneys when dealing with courts, adversaries, and most everyone else—except clients. There are two ways to correct this deficiency: (1) create a rule that requires complete truthfulness in all statements made by a lawyer to a client; or (2) create a rule that requires truthfulness in all material statements made by a lawyer to a client.

The Restatement (Third) of the Law Governing Lawyers opts for the first alternative. Section 16(3) of the Restatement states that a lawyer must “deal honestly with the client.”<sup>76</sup> Comment (e) to § 16 explains that this obligation of “honesty” prohibits a lawyer from knowingly making a false statement to a client and further requires all disclosures necessary to avoid misleading a client.<sup>77</sup> Several advantages attach to the Restatement’s approach of requiring truthfulness in all communications from a lawyer to a client regardless of materiality. First, such a rule is consistent with a lawyer’s fiduciary duty of absolute and perfect candor, openness, and honesty.<sup>78</sup> Second, the “complete truth” approach avoids the

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73. See *Honesty/Ethics in Professions*, GALLUP (Dec. 5–8, 2013), <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (reporting that 20% of respondents rated lawyers’ honesty and ethics as “very high” or “high”).

74. Lerman, *supra* note 63, at 696.

75. Comm. on Prof’l Ethics & Conduct v. Bauerle, 460 N.W.2d 452, 453 (Iowa 1990); see also *Ex parte Wall*, 107 U.S. 265, 273 (1883) (“[A] court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients . . .”).

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

77. *Id.* § 16 cmt. e.

78. See *supra* notes 47–51 and accompanying text.

difficult task of determining whether a false statement to a client is material.<sup>79</sup> Third, a rule publically declaring that lawyers owe clients a duty of complete truthfulness enhances public confidence in the integrity of the profession and reassures clients of their lawyers' loyalty.

Borrowing from the Restatement, a new paragraph (c) could be added to Rule 1.4, requiring complete truthfulness in communications by a lawyer to a client:

#### Rule 1.4 Communication

(a) . . .

(b) . . .

(c) A lawyer shall not knowingly make a false statement to a client and shall make disclosures to a client necessary to avoid misleading the client.<sup>80</sup>

Alternatively, a new rule could incorporate the materiality requirement of Model Rule 4.1. Rule 4.1 requires truthful representations to third persons only when the representation concerns a material fact. If patterned after Rule 4.1, new paragraph (c) to Rule 1.4 would provide: "A lawyer shall not knowingly make a false statement of material fact or law to a client and shall make disclosures to a client necessary to avoid materially misleading the client."

Limiting a lawyer's duty of truthfulness to material matters, however, runs counter to the fiduciary obligation of complete honesty to a client, feeds the public's unflattering presumption of lawyer dishonesty, and requires a judgment as to which misrepresentations are important enough to be classified as material.

### VIII. CONCLUSION

If lawyers are prohibited from lying to their clients as a matter of ethics,<sup>81</sup> a Model Rule should say so explicitly. As demonstrated in Part VII, amending Rule 1.4 to include a duty of complete truthfulness to a client or, alternatively, a duty of truthfulness as to material matters is not a complicated task.

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79. See RESTATEMENT (SECOND) OF TORTS § 538(2) (1977) (defining materiality to include an objective and subjective component); HAZARD, JR. ET AL., *supra* note 2 § 37.3, at 37-6 ("A rule flatly prohibiting all falsehoods is easier to understand, easier to obey, and easier to administer.").

80. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. e (2000) ("A lawyer may not knowingly make false statements to a client and must make disclosures to a client necessary to avoid misleading the client.").

81. See ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 8.4(c) annot. at 584 (6th ed. 2007) ("A lawyer may not mislead or lie to a client.").

In the event the legal profession decides that defining the standard of truthfulness applicable to communications with a client is inappropriate for a Model Rule, then a comment to Rule 1.4 should admit as much and explain why a client is not entitled to know the level of truthfulness he has a right to expect from his lawyer.