Attorney Deceit Statutes: Promoting Professionalism Through Criminal Prosecutions and Treble Damages

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Unbeknownst to many lawyers, at least twelve jurisdictions — including New York and California — have statutes on the books that single out lawyers who engage in deceit or collusion. In nearly all of these jurisdictions, a lawyer found to have engaged in deceit or collusion faces criminal penalties and/or civil liability in the form of treble damages. Until recently, these attorney deceit statutes have languished in obscurity and, through a series of restrictive readings of the statutory language, have been rendered somewhat irrelevant. However, in 2009, the New York Court of Appeals breathed new life into New York's attorney deceit statute through its decision in Amalfitano v. Rosenberg. *This Article discusses the extent to which, in this age of widespread distrust of the legal profession, this type of external regulation of the legal profession is a desirable approach. The Article concludes that although the utility of existing attorney deceit statues is undermined by the broadness of the language, the symbolism of the statutes is important. By relying on the development of tort law to address the same subject matter, courts can achieve the same educational and symbolic goals while dealing with attorney deceit on a more practical basis.*

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INTRODUCTION

It is provided also, that if any serjeant, pleader, or other, do any manner of deceit or collusion in the king's court, or consent unto it, in deceit of the court, or to beguile the court, or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man; and if he be no pleader, he shall be imprisoned in like manner by the space of a year and a Day at least; and if the trespass require greater punishment, it shall be at the king's pleasure.

— Chapter 29, First Statute of Westminster (1275)

***deceit**: 1. The action or practice of deceiving; concealment of the truth in order to mislead; deception, fraud, cheating, false dealing.*

— The Oxford English Dictionary (2d ed.)

There can be little doubt that the legal profession has a problem in terms of the public's perception of lawyers' honesty and the profession's ability and willingness to police its members. Although there may be dispute within the legal profession as to just how widespread attorney deceit is within the practice of law, surveys consistently reveal that the public has a low opinion of lawyers' honesty.[1] When discussing the lawyer disciplinary process, commentators also frequently make note of the public's skepticism regarding whether the legal profession is willing to draft and enforce professional ethics rules in the public's interest, rather than the

[1] *See* Michael C. Dorf, *Can the Legal Profession Improve Its Image?: Americans Believe Lawyers to Be Necessary but Dishonest, Survey Finds*, FINDLAW'S WRIT (Apr. 17, 2002), http://writ.news.findlaw.com/dorf/20020417.html (reporting findings of Columbia Law School survey showing that nearly forty percent of respondents believed that lawyers were either especially dishonest or somewhat dishonest); Lydia Saad, *Nurses Shine, Bankers Slump in Ethics Ratings*, GALLUP NEWS SERVICE (Nov. 24, 2008), http://www.gallup.com/poll/112264/nurses-shine-while-bankers-slump-ethics-ratings.aspx (reporting survey results placing legal profession among lowest of professions in terms of honesty and ethics); *see also* Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, 79-Sep A.B.A. J. 60, Sept. 1993, at 60, 62 (reporting that only twenty-two percent of respondents to poll believed that phrase "honest and ethical" describes lawyers).

interest of the profession itself.[2] For some time now, those who closely watch the legal profession have warned that if the legal profession does not do a better job of addressing the public's concerns over dishonest and unethical behavior among lawyers, legislators and external agencies may step in and take away some or all of the legal profession's traditional authority to regulate itself.[3]

In response, state bars have increasingly focused on internal reforms. These reforms include measures such as expanded Continuing Legal Education (CLE) requirements, a greater focus on professionalism, and the promulgation of lawyer civility codes.[4] However, it is questionable what sort of success these measures have had in addressing the public perception concerning lawyers' honesty and the legal profession's ability to govern itself.

A handful of states have recently considered initiatives that would have stripped the judiciary of its traditional power to regulate the practice of law.[5] Citing the need for "a maximum level of competence, extreme honesty, unyielding integrity and respect for the law from those who[] are licensed to practice law" as well as the failure of the Arizona Supreme Court "to provide that level of professionalism," an Arizona organization in 2007 sponsored an initiative to grant the

[2] *See* Kristin L. Fortin, *Reviving the Lawyer's Role as Servant Leader: The Professional Paradigm and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 594 (2009) ("Society now questions whether it can trust modern lawyers to elevate client representation and public service over self-interest."); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 257 (2001) ("[T]he legal profession at times has given the public reason to doubt its integrity of purpose when adopting certain ethics rules in the past . . . ."); *Around the Nation*, PROF. LAW., Winter 1999 at 24, 24 (noting "growing public mistrust of the profession's ability to police itself").

[3] Kim, *supra* note 2, at 257; ABA Comm'n on Professionalism, ". . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 248 (1986). *But see* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1148-49 (2009) (suggesting that "courts, commentators, and legal ethics regulators" downplay extent of external regulation of legal profession and "continue to conceptualize law as a 'self-regulated profession' ").

[4] *See Around the Nation*, *supra* note 2, at 24 (noting rise in CLE programs focusing on professionalism and promulgation of civility codes); *see also* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1342-43 (1997) ("In recent years, the legal profession has become increasingly concerned with 'professionalism,' as well as with the public's perception of attorneys' credibility, morality, and utility.").

[5] *See* Vesna Jaksic, *Some States Seek Change in How Lawyers Are Regulated*, 30 NAT'L L.J. 6, 6 (2008).

authority to license lawyers to the state's legislature.[6] In 2008, a South Carolina legislator introduced a constitutional amendment that would similarly have stripped that state's supreme court of its oversight of the legal profession.[7] In 2009, an Oklahoma state representative similarly introduced a measure that would have amended the state constitution to require legislative approval "of any rule adopted for inclusion in the Oklahoma Rules of Professional Conduct."[8] Although none of these measures was enacted, they produced considerable discussion in their respective states.[9]

At the federal level, the Enron scandal led some in Congress and federal agencies to question the ability of state bars to regulate the legal profession. In commenting on the Sarbanes-Oxley Act, for example, Securities and Exchange Commission ("SEC") Chairman Harvey Pitt noted the public skepticism concerning the willingness of the legal profession to police itself.[10] He also pointed out the "generally low level of effective responses" the SEC received upon referring possible disciplinary proceedings to state authorities and warned that if state bars were unwilling to assume the task of disciplining securities lawyers, the SEC would do so.[11]

Others have suggested using existing legal devices to address the problem of unethical and dishonest lawyering. Some commentators have focused on amending the ethical rules dealing with deceit and

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[6] COMM. FOR THE PRES. OF CONSTITUTIONAL GOV'T, Application for Initiative or Referendum Petition Serial Number, http://www.azsos.gov/election/2008/general/ballotmeasuretext/i-08-2008.pdf (last visited Oct. 12, 2010); *see id.*

[7] *See* Jaksic, *supra* note 5, at 6.

[8] H.R.J. Res. 1028, 52d Leg., 1st Sess. (Okla. 2009).

[9] *See, e.g.*, Ruth W. Cupp, Commentary, *Bills Penned by Physician-Legislator Would Treat Lawyer Regulation the Same as Barbers'*, S.C. LAW. WKLY., Feb. 11, 2008, *available at* 2008 WLNR 25358392 (discussing impetus for proposed legislation in South Carolina); Gregory Froom, *S.C. Bar President Updates Delegates on Midterm Progress*, S.C. LAW. WKLY., Feb. 4, 2008, *available at* 2008 WLNR 25330857 (describing discussion of South Carolina measure).

[10] *See* Rachel McTague, *Pitt Says SEC Will Take on Assignment of Disciplining Lawyers if State Bars Do Not*, 18 LAWS. MANUAL ON PROF. CONDUCT (ABA/BNA), no. 20, at 591, 591 (Sept. 25, 2002) (quoting Pitt as saying two relevant questions are " 'Where were the lawyers?' and 'What were the lawyers doing to prevent violations of the law?' "); James Podgers, *Seeking the Best Route*, A.B.A. J., Oct. 2002, at 68, 68 (quoting Pitt as noting "skepticism about the degree to which the legal profession can police itself . . . ").

[11] Podgers, *supra* note 10, at 68 (quoting Pitt). Senator John Edwards made a similar observation during consideration of the Sarbanes-Oxley Act. "With Enron and WorldCom, and all the other corporate misconduct we have seen, it is again clear that corporate lawyers should not be left to regulate themselves . . . ." 148 CONG. REC. S6552 (daily ed. July 10, 2002) (statement of Sen. John Edwards).

the making of false statements to third parties during the course of representation so that they are less tolerant of deceptive statements and practices.[12] Others have focused on the use of discovery and other judicial sanctions against lawyers as a means of addressing dishonest conduct.[13]

Generally absent from this discussion is any suggestion that the criminal law should be expanded specifically to target attorney deceit. The high-profile prosecution of lawyer Lynne Stewart for material support of terrorist activity for actions taken while she was representing a client cast a spotlight on potential accomplice liability for lawyers.[14] In addition, there are a few criminal statutes — such as those prohibiting barratry or the hiring of runners to solicit employment — that specifically single out lawyers and other professionals for punishment.[15] But the perception at least is that the criminal law that applies to lawyers is generally that which applies to nonlawyers.[16]

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[12] *See, e.g.*, Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J 935, 951 (2001) ("[S]ome of the rules permit conduct that may be viewed as deceitful . . . ."); Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 1 J. DISP. RESOL. 119, 139 (2007) (proposing revision to ABA Model Rules of Prof'l Conduct R. 4.1).

[13] *See, e.g.*, Richard Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819, 917 (2004) (arguing that Rule 11 should be amended to become vehicle to enforce litigation ethics rules contained in Model Rules of Professional Conduct); Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 959, 975 (1991) (suggesting that Rule 11 may be "a better balance among lawyer, client, and society"); Thomas C. Tew, *Electronic Discovery Misconduct in Litigation: Letting the Punishment Fit the Crime*, 61 U. MIAMI L. REV. 289, 306-08 (2007) (arguing that "there are many opportunities for improvement in the Rules [of Civil Procedure]" to address discovery abuses).

[14] *See* Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 975 (2006) (discussing Stewart's case).

[15] *See* CAL. BUS. & PROF. CODE § 6152 (West 2003) (prohibiting lawyers from using "runner[s]" to solicit employment); TEX. PENAL CODE ANN. § 38.12(a)(3) (West 2009) (prohibiting barratry).

[16] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 8 cmt. c (2000) ("For the most part, the substantive law of crimes applicable to lawyers is that applicable to others."); Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541, 559 (2009) (noting that "lawyers are subject to criminal law and that nothing about the roles prescribed in [ethics] codes excuses lawyers from abiding by laws of general applicability"). *But see* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 330-31 (1998) (suggesting that existing scholarship underestimates extent to which criminal law regulates lawyers' conduct).

This is essentially true. But, unbeknownst to most lawyers, there are numerous jurisdictions that already have criminal statutes in place that specifically target attorney deceit. At least twelve jurisdictions — including California and New York — have statutes on the books that single out lawyers who engage in deceit or collusion.[17] In nearly all of these jurisdictions, a lawyer found to have engaged in such action faces criminal penalties, civil liability in the form of treble damages, or both.

The fact that most people have paid little attention to these attorney deceit statutes is understandable. Until recently, the statutes have languished in obscurity and, through a series of restrictive readings of the statutory language, courts have rendered them somewhat irrelevant. However, in 2009, the New York Court of Appeals breathed new life into New York's attorney deceit statute through its decision in *Amalfitano v. Rosenberg*.[18] In *Amalfitano*, the court explained that, contrary to at least several decades of prior case law, New York's statutory language should be read broadly to prohibit a potentially wide range of deceitful conduct on the part of attorneys.[19] As a result, New York's attorney deceit statute is once again relevant.

This Article considers what influence *Amalfitano* may have in other jurisdictions, many of which borrowed their own attorney deceit statutes from New York.[20] But, as importantly, the Article discusses the extent to which, in this age of widespread distrust of the legal profession, this type of external regulation of the legal profession is a desirable approach. Part I discusses the various forms attorney deceit may take, as well as the existing rules of professional conduct and civil procedure that apply. Part II discusses the various tort theories that might also apply to attorney deceit and the special rules courts have developed that tend to limit liability in these cases. Part III examines the provisions and majority interpretations of the existing attorney deceit statutes before turning to an examination of the New York Court of Appeals' decision in *Amalfitano*. Finally, Part IV explores the potential and likely implications of *Amalfitano*. Although *Amalfitano* is unlikely to have immediate and dramatic effects beyond New York, the Article concludes that *Amalfitano* may prove to be significant in terms of reflecting an increasing intolerance of overly zealous attorney behavior and the legal profession's perceived unwillingness to confront the problem. Moreover, the Article argues that although *Amalfitano*'s expansive interpretation of New York's attorney deceit

[17] *See infra* note 191 and accompanying text.

[18] Amalfitano v. Rosenberg, 903 N.E.2d 265, 268-69 (N.Y. 2009).

[19] *Id.* at 268.

[20] *See infra* note 188 and accompanying text.

statute might be problematic due to its over-breadth, there is an increased role for courts to play in addressing the problem of attorney deceit through the development of tort law.

I. DECEIT IN THE PRACTICE OF LAW

Attorney deceit may take many forms, from lying to clients to concealing facts from the court.[21] ABA Model Rule of Professional Conduct Rule 8.4(c) contains a general prohibition on dishonest conduct, declaring that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[22] Rule 8.4(c) is sweeping in its scope insofar as it applies not only to dishonest conduct occurring in the course of representing a client but to dishonest conduct in a lawyer's private life.[23] One of the difficulties in regulating dishonest conduct by attorneys is that it is often difficult to draw the line between engaging in prohibited dishonesty and fulfilling one's ethical obligations to a client.[24] As a result, there are numerous ethical rules that speak more directly to specific forms of attorney deceit occurring during the course of representing a client in pursuit of the client's objectives. The following Part briefly discusses some of the more common examples of deceitful conduct in the practice of law.

A. Deceit in Motion Practice

"Deceit" is not a word typically used in connection with the initiation of a legal action or the filing of a motion. However, knowingly making false allegations in a complaint or motion certainly meets the definition of deceptive conduct in that it represents an attempt to mislead a court.[25] Thus, at least in the general sense of the term, it is a form of fraud upon the court.[26] There are potentially several disciplinary rules that apply to such action.

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[21] *See* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 663 (1990) (employing definition of deception that includes message meant to mislead others, including through silence).

[22] MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2008).

[23] Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 270 (2009).

[24] *See id.* at 249-50 (noting "paradoxical nature of negotiation").

[25] *See* John A. Humbach, *Shifting Paradigms of Lawyer Honesty*, 76 TENN. L. REV. 993, 993 (2009) (stating that truly honest lawyers would never "assert or controvert" issues unless there was basis in actual fact for assertion).

[26] *See* E. Fin. Corp. v. JSC Alchevsk Iron & Steel Works, 258 F.R.D. 76, 88 (S.D.N.Y. 2008) (concluding that attorney who made misrepresentations in filing

Aside from Model Rule 8.4(c)'s general prohibition on dishonest conduct, Model Rule 3.1 and its equivalent Federal Rule of Civil Procedure, Rule 11, prohibit bringing a proceeding or asserting an issue therein without a nonfrivolous basis for doing so.[27] A comment to Model Rule 3.1 explains that an action is frivolous where the lawyer is unable to make a good faith argument in support of a client's position.[28] Thus, a lawyer who knowingly includes a false allegation in a complaint or who knowingly makes a false assertion of fact while filing a motion during a proceeding is subject to discipline as well as Rule 11 sanctions.[29]

Such conduct might also violate a lawyer's duty of candor toward the tribunal.[30] Model Rule 3.3(a)(1) addresses other instances of what can broadly be called fraud upon the court.[31] Specifically, the rule prohibits a lawyer from knowingly making a false statement of fact or law to the tribunal.[32] A comment explains that:

> [A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer

motion for default judgment had committed fraud upon court).

[27] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002); Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 798 (2004) (stating that "[t]he language of Model Rule 3.1 is strikingly similar to Rule 11's language").

[28] MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2.

[29] *See generally* Fla. Bar v. Thomas, 582 So. 2d 1177, 1178 (Fla. 1991) (reprimanding lawyer for filing frivolous lawsuit to punish another lawyer who had represented clients who had opposed lawyer in other matters); *In re* Boone, 7 P.3d 270, 280 (Kan. 2000) (explaining that same objective standard of good faith applies to both Rule 11 and Model Rule 3.1).

[30] *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002) (describing lawyer's duty of candor to tribunals).

[31] Wright & Miller have noted the difficulty courts have had in articulating a single definition of this term. According to Wright & Miller:

> A number of courts have accepted the suggestion of a distinguished commentator that "fraud upon the court" is fraud that "does or attempts to, subvert the integrity of the court itself," or that is "perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudgingcases that are presented for adjudication."

11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2870 (2d ed. 2010) (citations omitted).

[32] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1).

> knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.[33]

Similarly, Model Rule 3.3(a)(3) prohibits a lawyer from knowingly submitting false evidence, including submitting deceptive or fraudulent supporting documents in connection with the filing of motions.[34]

Significantly, neither of these rules requires that the intended audience of the false statement actually relies on the statement to his or her detriment. The offenses are complete upon the making of the false statement. Also noteworthy is the fact that materiality is not a requirement under Model Rule 3.3(a); for disciplinary purposes, any false statement of fact to a tribunal — regardless of whether it is material — is actionable.

In contrast, a lawyer who, in the course of representing a client, makes a false statement of fact to a third party (such as opposing counsel), is only subject to discipline under Rule 4.1(a) when the misrepresentation is material.[35] However, once again, reliance on the part of the third person is not a requirement. Thus, lawyers who have filed frivolous claims[36] or made misrepresentations in support of motions[37] have faced discipline under Rule 4.1(a) despite the fact that the other side may not have been deceived by the lawyer's actions.

B. Deceit in the Discovery Process and in the Presentation of Evidence

As Professor Bradley Wendel has noted, "the discovery system is designed to facilitate truth-finding."[38] Yet, deception in the discovery

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[33] *Id.* cmt. 3.

[34] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3); *see, e.g.*, Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523 (5th Cir. 1992) (finding violation where lawyer submitted deceptive documents in support of motion); *In re* Neitlich, 597 N.E.2d 425 (Mass. 1992) (suspending lawyer who committed fraud upon court and opposing party "by actively misrepresenting terms of client's pending real estate transaction"); *In re* Eadie, 36 P.3d 468, 477 (Or. 2001) (imposing discipline against lawyer who lied to judge about other side in motion to quash proceeding); *see also In re* Carmick, 48 P.3d 311, 315 (Wash. 2002) (involving disciplinary proceeding against lawyer who made misrepresentations during *ex parte* proceeding before judge).

[35] *Cf.* MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2002) ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of *material* fact or law to a third person . . . .") (emphasis added).

[36] *See In re* Selmer, 568 N.W.2d 702, 704 (Minn. 1997).

[37] *See* Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 529 (5th Cir. 1992); *see also* Columbus Bar Ass'n v. Battisti, 739 N.E.2d 344, 345 (Ohio 2000) (involving discipline under analogue to Rule 4.1(a)).

[38] W. Bradley Wendel, *Rediscovering of Discovery Ethics*, 79 MARQ. L. REV. 895, 895

process is a common complaint among practitioners.[39] Perhaps one reason for this is the tension inherent in the discovery process. On the one hand, except where information is protected by the attorney-client privilege or work product doctrine, the discovery rules trump a lawyer's duty to keep client information confidential.[40] On the other hand, the ethical duty to keep client information confidential occupies a central role in the legal profession.[41] Thus, the natural tendency for many lawyers is to resist the disclosure of client information. In addition, many lawyers are competitive by nature, and the idea of voluntarily disclosing information that might damage a client's case is antithetical to the nature and training of many lawyers.[42] Thus, providing the opposing side with potentially damaging information amounts to the opposite of zealous representation in the eyes of some lawyers and smacks of doing "the opposing lawyer's job."[43]

Deceptive behavior during the discovery process is most frequently addressed through court-imposed sanctions.[44] Rule 37 of the Federal Rules of Civil Procedure list a variety of possible sanctions for discovery abuses, including prohibiting the offending party from introducing evidence, striking pleadings, and dismissing the action.[45] Courts also possess the ability to sanction individual attorneys.[46] In addition, courts possess broad inherent powers to devise their own sanctions to address discovery abuses.[47]

Attorneys may also face professional discipline for dishonesty occurring during the discovery process. The disciplinary rules

(1996).

[39] *See, e.g.*, Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 736 (1998) (concluding that there is consensus that "adversary excess" including "dishonest and hyper-aggressive behavior in discovery" is frequent); Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 1006 (2009) (stating there is "high incidence of lawyer misconduct in e-discovery").

[40] FED. R. CIV. P. 26(b)(3).

[41] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002).

[42] *See generally* Leslie C. Levin, *Bad Apples, Bad Lawyers and Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549, 1552 n.30 (2009) ("As a group, lawyers tend to be more aggressive, competitive and achievement-oriented than the average individual.").

[43] Helen W. Gunnarsson, *Law Pulse*, 90 ILL. B.J. 62, 62 (2002).

[44] *See, e.g.*, Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269, 304 (2000) ("[B]ar discipline rarely has been imposed for discovery abuse . . . .").

[45] FED. R. CIV. P. 37.

[46] FED. R. CIV. P. 26(g)(3).

[47] Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); Tew, *supra* note 13, at 323.

discussed above concerning material misrepresentations to a tribunal, misrepresentations to third parties, and knowingly presenting false evidence[48] all apply with equal force to the discovery process. Thus, lawyers have faced professional discipline under each of these rules for providing deceptive responses to interrogatories and other discovery requests.[49]

Lawyers may also face professional discipline and judicial sanctions for engaging in the spoliation — or the destruction, alteration, falsification, or concealment — of evidence.[50] In addition to some of the more general rules regarding dishonest conduct, several disciplinary rules speak directly to this type of behavior on a lawyer's part. For example, Model Rule 3.4(a) prohibits a lawyer from unlawfully obstructing another party's access to evidence or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value.[51] Lawyers are also subject to discipline for assisting or counseling clients to engage in such conduct.[52] Spoliation may involve both fraud upon the court and the other party. The wrongdoer may be attempting to deceive the other side into believing that the relevant evidence does not exist or exists only in the form offered. However, because courts base decisions on

[48] *See supra* notes 31-37 and accompanying text.

[49] *See In re* Shannon, 876 P.2d 548, 552 (Ariz. 1994), *modified*, 890 P.2d 602 (Ariz. 1994) (disciplining lawyer who changed client's answers to interrogatories before filing them in violation of Rule 3.3(a)(3)); *In re* Griffith, 800 N.E.2d 259, 264 (Mass. 2003) (involving discipline under state analogue to Rule 4.1(a) for providing deceptive responses to interrogatories); Miss. Bar v. Land, 653 So. 2d 899, 909 (Miss. 1994) (suspending lawyer who provided deceptive answers to interrogatories in effort conceal evidence in violation of Rule 3.3(a)(3)); *In re* Estrada, 143 P.3d 731, 740 (N.M. 2006) (concluding that lawyer violated state disciplinary rule prohibiting lawyer from engaging, or counseling client to engage, or assisting client, "in conduct that . . . misleads the court" by, *inter alia*, falsely denying plaintiff's request for admission of fact).

[50] *See generally* Loomis v. Ameritech Corp., 764 N.E.2d 658, 662 (Ind. Ct. App. 2002) (defining spoliation of evidence).

[51] MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2002); *see also In re* Selmer, 568 N.W.2d 702, 704-05 (Minn. 1997) (suspending lawyer for, *inter alia*, knowingly offering false evidence during discovery).

[52] *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (prohibiting lawyer from counseling or assisting another person in such conduct); *id.* R.3.4(b) (prohibiting lawyer from counseling or assisting witness to testify falsely or offering inducement to witness that is prohibited by law); *see also id.* R.1.2(d) (prohibiting lawyer from counseling client to engage, or assisting client, in conduct that lawyer knows is criminal or fraudulent); *In re Griffith*, 800 N.E.2d at 264 (suspending lawyer who, along with his client, provided deceptive responses to interrogatories).

evidence, an assertion regarding a piece of evidence is as much a fraud upon the court as it is a fraud upon the opposing party.[53]

Closely related to the spoliation of evidence problem is the presentation of false evidence and perjured testimony during a proceeding. In addition to the more generalized ethics rules regarding honesty, Model Rule 3.3(a) prohibits a lawyer from offering evidence the lawyer knows to be false.[54] This rule covers testimonial as well as other forms of evidence.[55] As is the case with intentional spoliation of evidence, presenting false evidence is a form of fraud upon the court.

Again, courts have a variety of tools at their disposal to deal with these kinds of dishonesty regarding evidence. One frequently recognized solution to the problem of spoliation is the creation of an inference permitting a jury to conclude that the missing or altered evidence was unfavorable to the party responsible.[56] Rule 60(b)(3) of the Federal Rules of Civil Procedure provides that courts have the authority to vacate judgments on the basis of fraud, misrepresentation, or other misconduct. Courts also possesses the inherent authority — noted in Rule 60(d)(3) — to vacate a judgment on the basis of fraud upon the court, such as where a lawyer makes a false representation to the court.[57]

C. Deceit in Negotiations

One of the more widely discussed examples of attorney deceit is deceptive behavior during negotiations.[58] One of the greatest

[53] *See* Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995) (classifying lawyer's failure to disclose evidence during discovery as fraud upon court).

[54] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002); *see also In re* Watkins, 656 So. 2d 984, 984-85 (La. 1995) (suspending lawyer who filed physicians' reports into evidence knowing that they had been falsely altered).

[55] *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 6 (referring separately to false testimony and false evidence).

[56] *See, e.g.*, Meyn v. State, 594 N.W.2d 31, 34 (Iowa 1999) (recognizing inference). *See generally* MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 6 (prohibiting lawyer from offering false evidence or eliciting false testimony).

[57] *See* FED. R. CIV. P. 60(d)(3) (providing that nothing in Rule 60 limits court's ability to set aside judgment for fraud upon court); Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (noting inherent power of courts to vacate judgments on basis of fraud upon court); Coulson v. Coulson, 448 N.E.2d 809, 811 (Ohio 1983) (recognizing distinction between "fraud" listed in Rule 60(b)(3) and "fraud upon the court" listed in Rule 60(d)(3) and treating lawyer's misrepresentation to court as fraud upon court for purposes of Rule 60(d)(3)).

[58] For a representative sample of discussion of the subject, see Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive*

challenges in this area has been in defining what constitutes unprofessional conduct. For example, Model Rule 4.1(a) prohibits a lawyer from making a false statement of material fact. A comment to the rule, however, specifies several types of statements — such as statements during negotiations about a party's position on acceptable settlement terms — that will not amount to misconduct under the Rules.[59]

Although lawyers sometimes face professional discipline for affirmative misrepresentations made in the course of negotiations,[60] more common in the reported disciplinary decisions are instances in which an attorney is charged with misrepresentation through the omission of material facts.[61] These cases bring out some of the inherent tensions involved in the practice of law. On the one hand, a lawyer has a duty to pursue the lawful interests of a client.[62] Although a lawyer is not required to press for *every* advantage on behalf of a client, a lawyer certainly must try to obtain an advantageous result for the client.[63] In addition, a lawyer's duty of confidentiality on behalf of a client, coupled with the very nature of negotiation, may prohibit a lawyer from disclosing facts that might potentially be material to the other side.[64] On the other hand, lawyers do have a duty to be honest

Without Being Offensive, 38 S. TEX. L. REV. 713, 714 (1997); Patrick McDermott, *Lying By Omission? A Suggestion for the Model Rules*, 22 GEO. J. LEGAL ETHICS 1015, 1015-17 (2009); Richmond, *supra* note 23, at 271-81; William J. Wernz & David L. Sasseville, *Negotiation Ethics*, 66 BENCH & B. OF MINN. 22, 24-25 (2009).

[59] MODEL RULES OF PROF'L CONDUCT R. 4.1(a) cmt. 2 (2002).

[60] *See* Ausherman v. Bank of Am. Corp., 212 F. Supp. 2d 435, 439 (D. Md. 2002) (referring to lawyer who affirmatively lied about existence of confidential arrangement affecting settlement for professional discipline).

[61] *See* Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983); Ky. Bar Ass'n v. Geisler, 938 S.W.2d 578, 578-79 (Ky. 1997); *In re* Potts, 158 P.3d 418, 427 (Mont. 2007); State *ex rel.* Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855, 856 (Neb. 1987); *In re* Eadie, 36 P.3d 468, 477 (Or. 2001); *In re* Carmick, 48 P.3d 311, 315 (Wash. 2002); *see also* Pendleton v. Cent. N.M. Corr. Facility, 184 F.R.D. 637, 638-39, 641 (D.N.M. 1999) (involving Rule 11 motion based on failure to disclose information); Carpenito's Case, 651 A.2d 1, 4 (N.H. 1994) (finding violation of Rule 4.1(a) based on lawyer's failure to correct representation he subsequently learned was incorrect).

[62] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002) (explaining that lawyer must act "with commitment and dedication to the interests of the client").

[63] *See id.* (stating that lawyers are not bound "to press for every advantage that might be realized for client").

[64] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002) (providing generally that "[a] lawyer shall not reveal information relating to the representation of a client"); Richmond, *supra* note 23, at 260 ("Maintaining confidentiality is an important aspect of negotiations both in shielding clients' goals or strategies from discovery, and, in a

— or at least not to be dishonest — in their dealings with third parties.[65]

Lawyers facing disciplinary charges pursuant to Rule 4.1(a) have frequently defended themselves by citing the general rule that, in an adversarial system, a lawyer has no obligation to inform the other side of potentially relevant facts during the course of negotiations.[66] Equally well-established, however, is the idea that the omission of a material fact may amount to the equivalent of an affirmative false statement for the purposes of Model Rule 4.1(a).[67] The difficulty for lawyers and disciplinary authorities is deciding when a lawyer's silence crosses the line from ethical and effective representation into prohibited deceptive conduct.[68]

In some instances, the omission of a fact is so basic to the transaction and so material that it is easy to say that its omission is the equivalent of an affirmative misrepresentation. Thus, for example, it is difficult to feel much sympathy for the lawyer who faces discipline for settling a case after failing to mention that his client had actually died.[69] Other situations present closer calls, however. In one case, a lawyer was disciplined for failing to disclose the existence of an additional umbrella liability policy while negotiating a release when the other party was operating under the mistaken assumption that no such policy existed.[70] However, in another instance, a court held that a lawyer for an employer had no ethical duty to correct the other side's

worst case scenario, exposing lawyers to claims of misconduct if they wrongly conceal material facts that should have been disclosed to a counter-party.").

[65] *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2002) (prohibiting lawyer from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation"); *id.* R.4.1(a) (prohibiting lawyer from knowingly making false statement of material fact or law to third person).

[66] *See generally* MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1 (2002) ("A lawyer . . . generally has no affirmative duty to inform an opposing party of relevant facts."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) ("As a general matter, the Model Rules of Professional Conduct . . . do not require a lawyer to disclose weaknesses in her client's case to an opposing party, in the context of settlement negotiations or otherwise.").

[67] MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1.

[68] *Compare* Craver, *supra* note 58, at 717 (suggesting that some forms of deception in negotiation are ethically permissible), *with* Wernz & Sasseville, *supra* note 58, at 23 n.1 ("Craver seems to think a lawyer can be 'deceptive without being dishonest,' but Rule 8.4(c) puts dishonesty and deceit in the same category.").

[69] *See, e.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 508, 511-12 (E.D. Mich. 1983) (involving failure of counsel to inform opposing counsel of client's death before entering settlement negotiations); Ky. Bar Ass'n v. Geisler, 938 S.W.2d 578, 578-79 (Ky. 1997) (same).

[70] State *ex rel.* Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855, 856 (Neb. 1987).

mistaken (and ultimately detrimental) assumption regarding the employer's salary and promotion structure, reasoning that the other side could have discovered the information on its own.[71]

Where the deceit occurs in the course of a transaction without any connection to a legal proceeding, the fraud is simply upon the victim. Deceit in the course of settlement negotiations, however, also implicates fraud upon the court concerns. Parties must present their settlement agreement to a court for approval. If the agreement is the result of fraud upon one of the parties, the offending party is seeking to legitimize that fraud through the judicial system. Thus, although not "fraud upon the court" in the traditional sense, courts have been willing to overturn settlement agreements that were the result of fraud upon a party pursuant to Rule 60.[72]

D. Limitations to the Current Regulatory Approaches to Attorney Deceit

Despite the variety of options at the disposal of courts and disciplinary authorities to address attorney deceit, there remain a number of limitations. One shortcoming to relying heavily on the professional disciplinary process to address attorney deceit is that

[71] *See* Brown v. Cnty. of Genesee, 872 F.2d 169, 175 (6th Cir. 1989) (concluding that there was no unethical conduct by lawyer who failed to correct other side's misunderstanding). Lawyers must also be careful lest their affirmative statements or silence amount to assisting a client in committing a crime or fraud. A lawyer who knows a client is using the lawyer's services to commit a crime or fraud may avoid assisting the client in the endeavor simply by withdrawing from representation in the matter. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 3. However, Rule 4.1(b) explains that it is misconduct for a lawyer to "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by" the rules regarding client confidentiality. *Id.* R.4.1(b). Thus, "[i]f the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under [Rule 4.1(b)] the lawyer is required to do so, unless the disclosure is prohibited by [the rules regarding confidentiality]." *Id.* R.4.1 cmt. 3. Once again, the collision between a lawyer's duty to keep confidential information relating to the representation and a lawyer's duty to avoid assisting a client's crime or fraud creates, at best, a blurry line for lawyers to observe in their representation of clients. *See generally* Christine M. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 361 (2008) (noting "tension between confidentiality and disclosure obligations" present in disciplinary rules); Morgan Cloud, *Privileges Lost? Privileges Retained?*, 69 TENN. L. REV. 65, 92 (2001) (arguing that various disciplinary rules concerning confidentiality and assisting client's crime or fraud "create difficult, if not insoluble, moral, legal, and ethical difficulties for lawyers").

[72] *See, e.g.*, Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 832 (7th Cir. 1985) (noting that party may assert fraud as basis for attacking settlement).

discipline is relatively rare.[73] According to one author, "Researchers agree that sanctioning rates fall well below the level of sanction-worthy acts that lawyers commit in the aggregate."[74] Although fraudulent behavior would seem more likely to catch the attention of disciplinary authorities than other types of rule violations, some critics have questioned the willingness of disciplinary authorities to prosecute litigation-related misconduct.[75] Thus, critics have questioned the ability of the disciplinary process to serve as a meaningful deterrent to lawyer misconduct.[76]

Judicial sanctions for misconduct occurring during a legal process are far more common than professional discipline.[77] Sanctions serve many of the goals one would hope for in addressing attorney deceit, including deterrence, punishment, and promoting respect for the legal process.[78] In addition, given the range of sanctions at judges' disposal, judges may tailor sanctions on an individual basis as appropriate.[79] There is disagreement, however, about how effective judicial sanctions have been in dealing with abusive litigation and discovery-related misconduct.[80] Some commentators have criticized courts for their

[73] *See* Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 487 (2009) (referring to "the relatively rare occasion that an errant lawyer receives some form of professional discipline"); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 154 (2009) ("Although attorneys are bound to conform their behavior to these state codes, the rules in many instances prove only as effective as the strength and likelihood of their enforcement mechanism.").

[74] Bernstein, *supra* note 73, at 487 (citing Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 1 (2007)).

[75] *See* Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 552 (2009) (suggesting that "disciplinary counsels, with limited resources, do not believe litigation misconduct . . . is an area they need to police more vigorously"); Joy, *supra* note 27, at 812 ("Lawyer disciplinary enforcement rules and standards for imposing sanctions disfavor lawyer discipline for litigation conduct."); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 18 (2008) (noting limited resources on part of disciplinary agencies to limit prosecutions).

[76] *See* Levin, *supra* note 42, at 1582.

[77] *See generally* Joy, *supra* note 27, at 789-91 (noting relative lack of disciplinary cases involving filing of frivolous motions as compared to imposition of Rule 11 sanctions).

[78] Tew, *supra* note 13, at 322-23.

[79] *See, e.g.*, Reilly v. NatWest Mkts. Group, Inc., 181 F.3d 253, 267 (2d Cir. 1999) (noting ability of district judges to tailor sanctions against those who spoliate evidence); Tew, *supra* note 13, at 323 (noting courts have broad discretion in crafting sanctions for discovery abuse).

[80] *Compare* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (noting "the common lament that the success of judicial supervision in checking discovery abuse

unwillingness to impose more severe sanctions.[81] In addition, because one of the goals of judicial sanctions is to restore the innocent party to the position he or she would have been in but for the other's side misconduct,[82] the preferred remedy in many cases often involves nonmonetary sanctions such as adverse inferences regarding evidence or pleadings. Thus, the prejudiced party often goes without compensation for the added time, expense, and anxiety the other side's misconduct caused.[83] Critics have also questioned whether there is anything truly punitive about even the most severe nonmonetary sanctions. For example, Professor Charles R. Nesson has asserted that parties only destroy or conceal evidence because they believe it will be damaging to their cases.[84] Therefore, assuming the spoliator would have lost anyway, entering a default judgment leaves the spoliator where it would have been had the evidence been preserved. Furthermore, it denies the jury the opportunity to see how damaging the evidence truly was, thus possibly preventing the imposition of punitive damages.[85]

The ability of a court to vacate a judgment on the basis of fraud between the parties or upon the court under Rule 60(b) might potentially provide a remedy for the victims of discovery abuse and misrepresentations occurring during the litigation process. However, parties seeking relief under Rule 60(b)(3) face several potentially significant obstacles. First, courts often require that a party prove

has been on the modest side"), *and* Gordon, *supra* note 39, at736 ("Though perceptions differ, there seems to be some consensus that adversary excess is frequent, often not by any standard justifiable as zealous representation, and that many lawyers will indeed cross ethical lines when they think they can get away with it, which, because of the weakness of monitoring agents, they usually do."), *with* Joy, *supra* note 27, at 811 (arguing that Rule 11 sanctions have generally been effective in deterring litigation misconduct).

[81] *See* Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991).

[82] Tew, *supra* note 13, at 323.

[83] *See* Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 560 (2009) (stating that "the trend in recent years [is] more judicial willingness to award attorneys' fees and other monetary sanctions on discovery motions" but noting that "fee awards or other monetary sanctions are nowhere near as 'common' " as it might seem); Virginia L.H. Nesbitt, *A Thoughtless Act of a Single Day: Should Tennessee Recognize Spoliation of Evidence as an Independent Tort?*, 37 U. MEM. L. REV. 555, 575-76 (2007) (stating in context of destruction of evidence that sanctions typically invoked do not adequately serve goal of compensation).

[84] Nesson, *supra* note 81, at 801.

[85] *Id.* at 801-02.

fraud by clear and convincing evidence, a high burden.[86] In addition, the moving party must establish that the fraud prevented the party from "fully and fairly" presenting his or her case.[87] Parties seeking relief under Rule 60(d)(3) based upon fraud upon the court face their own obstacles. Courts tend to vacate judgments on this basis only where there is "the most egregious conduct involving a corruption of the judicial process itself," such as bribery of a judge.[88] As an example, according to Wright and Miller, there are only "a few cases" that treat perjury as the type of fraud upon the court that warrants vacating a judgment, although the fact that an attorney was involved in the fraud may be a relevant consideration.[89]

II. TORT LAW REMEDIES IN THE EVENT OF ATTORNEY DECEIT

In addition to facing professional discipline and judicial sanctions for engaging in deceit during the course of representing a client, there is always the possibility of civil liability for lawyers. There are a variety of tort theories that might potentially apply to a lawyer's deceptive conduct. However, in addition to the restrictive nature of some of these torts, courts have devised a number of special rules that tend to shield lawyers from liability.

A. Special Tort Rules that Apply to the Legal Profession

Before examining how general tort theories apply to situations involving attorney deceit, it is important first to note some of the special tort rules for lawyers. These are rules that cast a long shadow over the tort law governing lawyers. Specifically, these are the black-letter rules pertaining to the absence of any duty on the part of a lawyer to an opposing party and the absolute litigator's privilege.

The general rule, repeated by numerous courts, is that a lawyer owes no duty of care to an opposing party.[90] Thus, absent unusual circumstances, a lawyer who negligently makes a false statement of

[86] WRIGHT & MILLER, *supra* note 31, § 2860.

[87] *Id.*

[88] Roger Edwards, LLC v. Fiddes & Son Ltd., 427 F.3d 129, 133 (1st Cir. 2005) (stating that conduct in question must be severe and stating that "perjury alone . . . has never been sufficient") (quotations omitted); WRIGHT & MILLER, *supra* note 31, § 2870; *see also* Toscano v. Comm'r, 441 F.2d 930, 933-34 (9th Cir. 1971) (stating that term "fraud upon the court" must be construed narrowly in connection with Rule 60).

[89] WRIGHT & MILLER, *supra* note 31, § 2870.

[90] Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118, 122 (N.M. 1988); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. c (2000).

material fact to the opposing side does not face liability under a negligent misrepresentation theory.[91] And although courts often state the rule in terms of liability under a negligence theory, courts sometimes reference the rule when dealing with intentional fraud claims against attorneys. Courts have cited the rule in shielding lawyers from liability where the lawyers have been accused of fraud resulting from the failure to disclose material information, including the failure to disclose the fact that the lawyer's client has made a fraudulent statement.[92] Thus, the no-duty rule, although phrased in terms of negligence, has influence in the world of intentional torts as well.

The no-duty to nonclients rule is merely the black-letter expression of one of the most pervasive themes involving the legal profession: the system of resolving legal disputes is an adversarial one. Each side is best served by having a lawyer looking out for its own interests.[93] Because a lawyer's duties of confidentiality and loyalty run to the client, the threat of liability stemming from the failure voluntarily to disclose every potentially relevant fact would diminish the vigor and quality of representation.[94]

A similar sentiment underlies the second reoccurring special tort rule for lawyers: the litigator's privilege. As stated in section 586 of the *Restatement (Second) of Torts*, "[a]n attorney . . . is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding."[95] Thus, for example, an attorney who makes false and defamatory allegations in a complaint and attaches a supporting affidavit containing another's false and defamatory statements would

[91] *See, e.g.*, *Garcia*, 750 P.2d at 122 (asserting that "[n]egligence is not a standard on which to base liability of an attorney to an adverse party").

[92] *See, e.g.*, Schatz v. Rosenberg, 943 F.2d 485, 492 (4th Cir. 1991) (rejecting fraud claim against attorney based on failure to disclose client's misrepresentations); Schalifer Nance & Co. v. Estate of Warhol, 927 F. Supp. 650, 661 (S.D.N.Y. 1996) (dismissing fraud claims against attorney based on attorney's failure to volunteer information and failure to correct client's false statement).

[93] *See, e.g.*, Hall v. Univ. of Md. Med. Sys. Corp., 919 A.2d 1177, 1191 (Md. 2007) (explaining that justice is best served if skilled attorneys are left to resolve conflicting testimony).

[94] *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999) (justifying rule on grounds that lawyer must pursue client's interests with undivided loyalty).

[95] RESTATEMENT (SECOND) OF TORTS § 586 (1977).

enjoy an absolute privilege in a defamation action.[96] It is important to note that the privilege is absolute in nature. The fact that a lawyer has good reason to suspect or has actual knowledge that allegations contained in a court filing are untrue does not deprive the lawyer of the privilege.[97] The policy underlying the decision to make the privilege absolute in nature is one "of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients."[98]

Although developed in the defamation context, some jurisdictions have extended the privilege to other intentional torts, including tortious interference with contractual relations and abuse of process.[99] In a few cases, it has even been applied to claims of deceit or fraudulent misrepresentation involving lawyers.[100] Thus, like the no-duty to nonclients rule, the litigator's privilege reach extends beyond the confines of the area of its origin.

B. Tort Claims Involving Deceit in Motion Practice

Theoretically, there are any number of tort claims a party might bring against an attorney who has engaged in deceptive conduct connected to a pleading or the filing of a motion. This is true of traditional and well-established tort claims, such as defamation and misrepresentation, as well as less common claims, such as malicious defense. For a variety of reasons, however, litigants asserting such claims face a difficult road.

1. Defamation

The tort of defamation is a logical choice for a party defamed by false allegations contained in a pleading or motion. However, because the absolute litigator's privilege applies to all statements made in the institution of a judicial proceeding (including pleadings and affidavits), defamatory statements contained in pleadings or motions

[96] Nix v. Sawyer, 466 A.2d 407, 410, 413 (Del. Super. Ct. 1983).

[97] RESTATEMENT (SECOND) OF TORTS § 586 cmt. a.

[98] *Id.*

[99] *See* Alex B. Long, *Attorney Liability for Tortious Interference: Interference with Contractual Relations or Interference with the Practice of Law*, 18 GEO. J. LEGAL ETHICS 471, 513 (2005).

[100] *See, e.g.*, Janklow v. Keller, 241 N.W.2d 364, 370 (S.D. 1976) (dismissing deceit action based on absolute immunity afforded to attorney in judicial proceedings); Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 34 (Utah 2003) (barring deceit claim based on common law judicial proceeding privilege).

are likely to be privileged.[101] Thus, individuals who have been the subject of false and defamatory allegations made in pleadings or motions have had little success in pursuing defamation claims.[102]

2. Misrepresentation

A misrepresentation claim might be another theoretical possibility. However, the rule that a lawyer does not owe a duty of care to a nonclient would dispense with a negligent misrepresentation claim.[103] An aggrieved party might also attempt to bring a fraudulent misrepresentation claim. However, such a claim would likely fail on the merits. In order to prevail on a fraudulent misrepresentation claim, a plaintiff must establish not only that the defendant made a false statement of fact, but that the plaintiff justifiably relied on the misrepresentation to his or her detriment.[104] If anyone is likely to be deceived by false allegations contained in a court filing, it is the court, not the victim of the false allegations. Thus, the fraud that is perpetrated is perpetrated (if at all) upon the court, not the subject of the misrepresentation.[105]

3. Malicious Prosecution and Abuse of Process

Another possibility might be a malicious prosecution claim.[106] To prevail on this theory, a plaintiff must establish that the defendant initiated or continued civil proceedings without probable cause and

[101] *See* RESTATEMENT (SECOND) OF TORTS § 586 cmt. a. (explaining scope of privilege).

[102] *See, e.g.*, Surace v. Wuliger, 495 N.E.2d 939, 942-43 (Ohio 1986) ("[U]nder the doctrine of absolute privilege in a judicial proceeding, a claim alleging that a defamatory statement was made in a written pleading does not state a cause of action where the allegedly defamatory statement bears some reasonable relation to the judicial proceeding in which it appears."); McNeal v. Allen, 621 P.2d 1285, 1286-87 (Wash. 1980) (holding, as matter of public policy, that absolute privilege bars claim for defamation where statement has some relation to judicial proceeding in which it appears).

[103] *See, e.g.*, B.L.M. v. Sabo & Deitsch, 64 Cal. Rptr. 2d 335, 345 (Ct. App. 1997) (declining "to extend professional liability under a negligent misrepresentation theory to individuals who are not clients of the attorney" based on absence of duty owed to nonclients).

[104] RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

[105] *See generally* Amalfitano v. Rosenberg, 533 F.3d 117, 120-21, 124 (2d Cir. 2008) (classifying misrepresentations in complaint and in support of summary judgment motion as deceit upon court).

[106] The tort is also referred to as wrongful use or wrongful initiation of civil proceedings. RESTATEMENT (SECOND) OF TORTS § 674 (1977).

primarily for a purpose other than that of securing the proper adjudication of the claim.[107] To have probable cause, a defendant must at least reasonably believe in the existence of the facts as alleged.[108] Thus, alleging facts in the course of initiating or continuing civil proceedings without probable cause may amount to a form of deceit in some instances.

Given the potential for malicious prosecution claims to deter a party's willingness to file suit in an attempt to vindicate his or her rights, courts sometimes remark that such actions are disfavored in the law.[109] To that end, a substantial number of courts require that a plaintiff must demonstrate the existence of a "special injury" — "arrest, seizure of property, or 'injury which would not necessarily result from suits to recover for like causes of action' " — as part of the prima facie case.[110] Excluded from this definition is the expense incurred in defending against a baseless claim.[111]

A plaintiff who pursues a malicious prosecution claim against an opposing lawyer may face an especially difficult task. The *Restatement (Second) of Torts* devotes a separate comment in the section on malicious prosecution to situations in which the defendant is a lawyer.[112] Courts sometimes reference the concern that, if not carefully limited, malicious prosecution claims have the potential to chill a lawyer's willingness to pursue potentially meritorious claims on behalf of a client.[113] As a result, plaintiffs sometimes face special obstacles when attempting to recover from attorneys for wrongfully initiating civil suits on behalf of their clients, particularly on the question of whether an attorney lacked probable cause.[114] For instance, some courts have concluded that an attorney need not investigate a client's assertions in order to have the probable cause necessary to bring a

[107] *Id.* § 674(a). In addition, the proceedings must have terminated in the plaintiff's favor before the claim can be brought. *Id.* § 674(b).

[108] *Id.* § 675.

[109] Browning-Ferris Indus., Inc. v. Lieck, 881 S.W.2d 288, 291 (Tex. 1994).

[110] Joeckel v. Disabled Am. Veterans, 793 A.2d 1279, 1282 (D.C. 2002); *see* Friedman v. Dozorc, 312 N.W.2d 585, 601-03 (Mich. 1981) (retaining special injury requirement and citing other jurisdictions that have done same).

[111] *Joeckel*, 793 A.2d at 1282.

[112] *See* RESTATEMENT (SECOND) OF TORTS § 674 cmt. d.

[113] *See, e.g.*, Wilson v. Hayes, 464 N.W.2d 250, 259-60 (Iowa 1990) (describing malicious prosecution claims against attorneys).

[114] *See* Cottman v. Cottman, 468 A.2d 131, 136 (Md. Ct. Spec. App. 1983) (stating that such claims are viewed with disfavor in law and that this is "particularly true when the defendant is an attorney, because of the attorney's professional duty to represent his client zealously").

claim on the client's behalf, unless there is "compelling evidence" that the client's statements are untrue.[115] In commenting on the probable cause requirement, a Maryland court has stated that malicious prosecution claims are particularly disfavored "when the defendant is an attorney, because of the attorney's professional duty to represent his client zealously."[116]

Another possibility for the subject of false allegations in connection with a court filing is an abuse of process claim. One court has explained that "[g]enerally, abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process."[117] As the *Restatement (Second) of Torts* notes, "The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it."[118] Although conceptually similar to the malicious prosecution tort, abuse of process is broader in the sense that it covers various processes (such as the filing of an appeal[119] or even the filing of notice of an intent to take a deposition[120]) that are not covered under the former.[121] At the same time, however, some jurisdictions have extended the absolute litigator's privilege developed in the defamation context to abuse of process claims against lawyers, thereby limiting lawyers' liability.[122]

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[115] *Friedman,* 312 N.W.2d at 605; *see also Wilson*, 464 N.W.2d at 261 (quoting *Friedman*); Moiel v. Sandlin, 571 S.W.2d 567, 570 (Tex. Civ. App. 1978) ("Unless lack of probable cause for a claim is obvious from the facts disclosed by the client or otherwise brought to the attorney's attention, he may assume the facts so disclosed are substantially correct."); Milliner v. Elmer Fox & Co., 529 P.2d 806, 808 (Utah 1980) ("As a general rule, an attorney is not required to investigate the truth or falsity of facts and information furnished by his client, and his failure to do so would not be negligence on his part unless facts and circumstances of the particular legal problem would indicate otherwise or his employment would require his investigation."). *But see* Nelson v. Miller, 607 P.2d 438, 448-49 (Kan. 1980) (rejecting this rule as being "degrading to the legal profession").

[116] *Cottman*, 468 A.2d at 136.

[117] Wayne Cnty. Bank v. Hodges, 338 S.E.2d 202, 202-03 (W. Va. 1985) (quoting Preiser v. MacQueen, 352 S.E.2d 22, 28 (W. Va. 1985)).

[118] RESTATEMENT (SECOND) OF TORTS § 682 cmt. b. (1977).

[119] *See* Tellefsen v. Key Sys. Transit Lines, 17 Cal. Rptr. 919, 921 (Ct. App. 1961).

[120] *See* Thornton v. Rhoden, 53 Cal. Rptr. 706, 717 (Ct. App. 1966).

[121] Barquis v. Merchs. Collection Ass'n, 496 P.2d 817, 824 n.4 (Cal. 1972).

[122] *See* Long, *supra* note 99, at 491 ("[C]ourts have generally been more willing to afford attorneys an absolute immunity for abuse of process claims than for wrongful initiation claims.") (citing RESTATEMENT (SECOND) OF TORTS).

4. Malicious Defense

Another potentially relevant theory in the case of a lawyer who knowingly makes false assertions in connection with a motion is the tort of malicious defense.[123] Where recognized, the tort parallels the malicious prosecution tort, but, as its name implies, from the defense perspective. Thus, one who initiates or continues a defense in a civil proceeding without probable cause primarily for an improper purpose (such as to delay or harass) and who causes damages may be liable under a malicious defense theory where the tort is recognized.[124] As is the case with the majority approach to malicious prosecution claims, damages in this context would include emotional distress and the expense incurred in defending oneself in the proceeding.[125]

In theory, the tort could be broad enough to cover a variety of litigation tactics, ranging from denying, in bad faith, a valid claim while adopting a scorched-earth approach to litigation[126] to making false assertions or introducing fabricated evidence in support of a

[123] *See* Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 894 (1984) (noting conceptual similarity of claims and stating that failure to proscribe malicious defense encourages dishonesty).

[124] Aranson v. Schroeder, 671 A.2d 1023, 1028-29 (N.H. 1995). As stated by the New Hampshire Supreme Court:

> One who takes an active part in the initiation, continuation, or procurement of the defense of a civil proceeding is subject to liability for all harm proximately caused, including reasonable attorneys' fees, if
>
> > (a) he or she acts without probable cause, *i.e.*, without any credible basis in fact and such action is not warranted by existing law or established equitable principles or a good faith argument for the extension, modification, or reversal of existing law,
> >
> > (b) with knowledge or notice of the lack of merit in such actions,
> >
> > (c) primarily for a purpose other than that of securing the proper adjudication of the claim and defense thereto, such as to harass, annoy or injure, or to cause unnecessary delay or needless increase in the cost of litigation,
> >
> > (d) the previous proceedings are terminated in favor of the party bringing the malicious defense action, and
> >
> > (e) injury or damage is sustained.

Id.

[125] *See id.* at 1028.

[126] *See* Young v. Allstate Ins. Co., 198 P.3d 666, 670 (Haw. 2008) (involving allegations of this type of conduct).

motion during litigation.[127] The first jurisdiction to recognize such claims was the New Hampshire Supreme Court in *Aranson v. Schroeder* in 1995. In recognizing the existence of the tort, the court noted the inconsistency in permitting a plaintiff to recover when a groundless claim was asserted offensively, but not defensively.[128] In addition, the court suggested that sanctions against the offending party were not, standing alone, a sufficient remedy for a plaintiff.[129]

> [A]nyone who has been a litigant knows that the fact of litigation has a profound effect upon the quality of one's life that goes far beyond the mere entitlement to counsel fees. Litigation is a disturbing influence to one degree or another. The litigant may have the benefit of skilled and conscientious counsel as well as a strong and well-founded case on the facts, but until such time as the favorable verdict is in hand beyond the reach of appeal, there is a day-to-day uncertainty of the outcome. . . . If a factual predicate exists to support liability and a measure of the damages thus exacerbated, the plaintiffs are entitled to a remedy to that extent.[130]

The overwhelming majority of courts, however, have disagreed.[131] They have done so for numerous reasons, most notably that the availability of judicial sanctions for "frivolous or delaying conduct" is an adequate deterrent to such misconduct.[132] Other considerations are that permitting such claims "may 'have a chilling effect on some legitimate defense and perhaps drive a wedge between defendants seeking zealous advocacy and defense attorneys who fear personal liability in a second action' "; and, relatedly, that permitting such claims would threaten the absolute litigator's privilege.[133]

C. Tort Claims Involving Deceit in the Discovery Process and in the Presentation of Evidence

The victims of deceitful conduct occurring during the discovery process or as a result of deceitful conduct involving the presentation of

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[127] *See Aranson*, 671 A.2d at 1025.

[128] *Id.* at 1027.

[129] *Id.*

[130] *Id.* at 1028.

[131] *See Young*, 198 P.3d at 681-82 (noting that only New Hampshire has recognized tort and citing contrary cases).

[132] Sheldon Appel Co. v. Albert & Oliker, 765 P.2d 498, 503 (Cal. 1989).

[133] *Young*, 198 P.3d at 682-83, 684.

false evidence face many of the same obstacles as the victims of dishonest motion practice. Most courts do not recognize malicious defense claims[134] and often construe the abuse of process tort narrowly.[135] Plaintiffs seeking recovery for discovery abuses also frequently bump against many of the same concerns courts have expressed in other contexts about permitting civil liability stemming from litigation-related misconduct. As a result, plaintiffs have tried to advance new theories of liability, with only limited success.

1. No Civil Remedy for Perjury

Virtually every jurisdiction has concluded that there is no civil cause of action for perjury.[136] Because a witness's false statements amount to a fraud upon the court or jury, rather than a litigant, there is no reliance on the part of the litigant; thus, a common law fraudulent misrepresentation claim would not cover perjurious testimony.[137] This has left courts to consider whether a separate cause of action should exist in the case of perjured testimony.[138]

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[134] *See, e.g.*, Iantosca v. Merrill Lynch Pierce Fenner & Smith, Inc., No. 08-0775-BLS2, 2009 WL 981389, at *4 (Mass. Super. Ct. Nov. 25, 2008) (refusing to recognize tort in case involving deceit during discovery process). The only state supreme court decision to recognize the malicious defense tort involved the presentation of false evidence. *Aranson*, 671 A.2d at 1027.

[135] *See* Jay M. Feinman, *Incentives for Litigation or Settlement in Large Tort Cases: Responding to Insurance Company Intransigence*, 13 ROGER WILLIAMS U. L. REV. 189, 221 (2008) ("With a few exceptions, courts have not recognized a cause of action for defensive action, either in general under malicious prosecution or for abuse of process by particular defensive tactics."); Frances J. Mootz III, *Holding Liability Insurers Accountable for Bad Faith Litigation Tactics with the Tort of Abuse of Process*, 9 CONN. INS. L.J. 467, 488 (2003) (noting limited scope of tort); Jeffrey J. Utermohle, *Look What They've Done to My Tort, Ma: The Unfortunate Demise of "Abuse of Process" in Maryland*, 32 U. BALT. L. REV. 1, 1 (2003) ("Unfortunately, in Maryland, most victims of blatant litigation misconduct have no tort remedy because the state's highest court eviscerated the venerable tort of abuse of process . . . ."). *But see* Nienstedt v. Wetzel, 651 P.2d 876, 880 (Ariz. 1982) (permitting abuse of process claim stemming from abusive discovery tactics).

[136] *See* Cooper v. Parker-Hughey, 894 P.2d 1096, 1100-01 (Okla. 1995) (listing Maine as only jurisdiction to recognize such action and citing cases).

[137] *Id.* at 1100.

[138] The New York Court of Appeals has recognized a limited exception to this general rule. In *Aufrichtig v. Lowell*, 650 N.E.2d 401, 404 (N.Y. 1995), the court recognized a plaintiff's claim against a treating physician who provided a false affidavit to plaintiff's insurance company in a dispute. The court explained that since a physician stands in a relationship of confidence with the patient, he owes a duty to the patient to speak truthfully. Thus, even though there is generally no cause of action for perjury, the court was willing to recognize one in this limited situation. *See id.*

Courts have offered various justifications for not recognizing such claims. Perhaps most common is the recognition of an absolute privilege for witnesses who testify in judicial proceedings.[139] This privilege, which had long existed at common law, is designed to encourage witnesses "to speak freely without fear of civil liability."[140] Other justifications include the idea that "perjury [is] a crime of so high a nature that it concerns all mankind to have it punished" and that, therefore, it must be addressed by criminal law.[141] Other courts have observed that the rule is one of convenience, designed to preserve the finality of judgments.[142]

Importantly, the decision not to recognize perjury as a separate tort actionable under a fraud theory applies with equal force to lawyers who knowingly allow witnesses to testify falsely.[143] A lawyer who knowingly elicits perjured testimony may face criminal charges or professional discipline.[144] But since perjury itself is not actionable, a lawyer who knowingly assists another in the commission of perjury is not subject to civil liability.[145]

2. Spoliation of Evidence

Another possibility in the case of deceit in the discovery process or in the presentation of evidence is a tort claim of interference with the litigation process through the spoliation of evidence. In addition to judicial sanctions and the adverse evidentiary inference against the offending party, one possible solution to the problem of intentional destruction, alteration, or concealment of evidence would be the recognition of an independent spoliation of evidence tort. However, the majority of courts have refused to recognize such a theory.[146] In refusing to recognize spoliation tort claims, courts frequently assert

[139] *See* Kessler v. Townsley, 182 So. 232, 232-33 (Fla. 1938); RESTATEMENT (SECOND) OF TORTS § 588 (1977).

[140] *Cooper*, 894 P.2d at 1101; *see* Briscoe v. LaHue, 460 U.S. 325, 330-31 (1983).

[141] *Kessler*, 182 So. at 233; *see also Cooper*, 894 P.2d at 1101.

[142] *See Kessler*, 182 So. at 233.

[143] *See* Patel v. OMH Med. Ctr., Inc., 987 P.2d 1185, 1202-03 (Okla. 1999).

[144] Jurgensen v. Haslinger, 692 N.E.2d 347, 350 n.1 (Ill. App. Ct. 1998).

[145] *See generally* Douglas R. Richmond, *Lawyer Liability for Aiding and Abetting Clients' Misconduct Under State Law*, 75 DEF. COUNS. J. 130, 132 (2008) ("[A]iding and abetting liability is derivative in the sense that the alleged primary tortfeasor must, in fact, commit a tort for a defendant to be held liable as an aider and abettor.").

[146] Richard W. Bourne, *Medical Malpractice: Should Courts Force Doctors to Confess Their Own Negligence to Their Patients?*, 61 ARK. L. REV. 621, 639 (2009). *But see* Torres v. El Paso Elec. Co., 987 P.2d 386, 402 (N.M. 1999).

that the existence of professional discipline and the availability of judicial sanctions are adequate to deter spoliation.[147] Ultimately, the majority of courts thus far have concluded that the costs of recognizing an independent spoliation tort in terms of the uncertain nature of the tort and increased litigation outweigh the benefits.[148]

When courts have recognized the independent spoliation tort, they have typically required that a plaintiff establish that the spoliation resulted in damages.[149] The concept of damages in this instance relates to the plaintiff's lost opportunity to prevail in the underlying litigation. Thus, for example, the District of Columbia requires that the spoliation of evidence deprived the plaintiff of a significant possibility of success in the underlying litigation.[150] As a result, damages are adjusted for the estimated likelihood of success in the potential civil action.[151] Importantly, however, this approach means that a plaintiff faces the difficult task of proving that the spoliated evidence, which may no longer even exist, was so probative that it deprived the plaintiff of a substantial likelihood of prevailing. Thus, unlike most other intentional torts[152] where actual damages are not required, a plaintiff is unable to receive punitive damages or recover for any attendant emotional distress resulting from the defendant's wrongdoing unless the plaintiff can clear this often-difficult hurdle.[153]

D. Tort Claims Involving Deceit in Negotiations

Generally speaking, a lawyer may be held liable for making a fraudulent misrepresentation to a third party.[154] However, plaintiffs seeking remedies for attorney deception during the course of negotiations face several hurdles. First is the difficulty in establishing that a lawyer's silence amounts to a fraudulent misrepresentation. As mentioned, the general rule is that a lawyer does not owe a duty to volunteer information to the opposing side, and, in fact, a lawyer's duty of confidentiality may actually prevent a lawyer from disclosing information. As a result one would expect there to be fewer decisions

[147] *See, e.g.*, Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 518 (Cal. 1998) (discussing professional sanctions as deterrent to spoliation).

[148] *See id.* (noting these concerns).

[149] Bourne, *supra* note 146, at 640.

[150] Holmes v. Amerex Rent-A-Car, 180 F.3d 294, 297 (D.C. Cir. 1999).

[151] *Id.*

[152] In addition to intentional spoliation claims, plaintiffs have also alleged negligent spoliation.

[153] *See* Bourne, *supra* note 146, at 640; Nesson, *supra* note 81, at 799-801.

[154] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmt. g. (2000).

involving defendant-lawyers in which the lawyer's silence was found to be a misrepresentation.[155] There are a number of judicial decisions affirming the imposition of professional discipline against a lawyer resulting from the failure to disclose a material fact.[156] There are also a number of decisions invalidating agreements based upon a lawyer's nondisclosure of a material fact.[157] However, there are comparatively few corresponding common law fraud actions based upon nondisclosure.[158] Where attorneys have faced liability for failing to disclose facts during negotiations, the nondisclosures have typically more closely resembled active concealment or speaking in half-truths than actual silence.[159] Liability stemming from affirmative misrepresentation has occurred more frequently, such as in the case of the lawyer who makes false statements about the extent of insurance coverage.[160] However, reported decisions involving lawyer liability for affirmative misrepresentations are still somewhat uncommon.

Another potential limitation on a plaintiff's ability to recover against a lawyer for having made a fraudulent misrepresentation is the issue of justifiable reliance. Once a lawyer discloses information, the lawyer

[155] *See* Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825 (Iowa 2001).

[156] *See, e.g.*, La. State Bar Ass'n v. Klein, 538 So. 2d 559 (La. 1989) (demonstrating repercussions for attorney's failure to disclose material facts); State *ex rel.* Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855 (Neb. 1987) (suspending attorney for repeated failure to disclose material facts).

[157] *See, e.g.*, Stare v. Tate, 98 Cal. Rptr. 264 (Cal. Ct. App. 1971) (invalidating agreement because attorney was aware of mistake by other attorney and failed to disclose error); Kath v. W. Media, Inc., 684 P.2d 98 (Wyo. 1984) (invalidating agreement by court due to failure to disclose material fact).

[158] *But see* Wright v. Pennamped, 657 N.E.2d 1223 (Ind. App. 1995) (denying summary judgment to lawyer accused of fraud resulting from failure to inform other side that changes had been made to document).

[159] *See* Am. Family Serv. Corp. v. Michelfelder, 968 F.2d 667, 673 (8th Cir. 1992) (affirming jury verdict against lawyers who, *inter alia*, responded to other side's request to provide all documents relating to client's planned acquisitions or dispositions by providing some documents but failing to send agreement in principle to sell same business under negotiations); Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 29-30 (Ct. App. 2004) (permitting fraud claim against law firm to continue where firm allegedly told other side that there was "nothing unusual" about financing of deal when, in fact, there were several "toxic terms" related to financing that, if disclosed, would have killed deal); Cicone v. URS Corp., 227 Cal. Rptr. 887, 891 (Ct. App. 1986) (holding lawyer could be liable where he and client "made a promise without disclosing they entertained no intention to perform" promise).

[160] *See* Slotkin v. Citizens Cas. Co. of N.Y., 616 F.2d 301, 305 (2d Cir. 1979); Shafer v. Berger, 131 Cal. Rptr. 2d 777, 793 (Ct. App. 2003); Fire Ins. Exch. v. Bell, 643 N.E.2d 310, 312 (Ind. 1994).

has an obligation to disclose the information in a truthful manner.[161] However, what right does an opposing party have to rely on that information in an adversarial setting? In several instances, lawyers have argued that any reliance on the part of an opposing party in a negotiation regarding a lawyer's assertions is not justified given the adversarial nature of negotiations.[162] In general, courts have not been particularly receptive to this argument.[163]

Although lawyers have had little success arguing lack of justifiable reliance on the part of the other side during negotiations, there are some cases where justifiable reliance might come into play. The fact that the party who relied on a lawyer's misrepresentation is sophisticated or represented by counsel would be relevant to the question of whether the reliance was justified.[164] Given the courts' longstanding support of the adversarial nature of litigation and negotiation, it should not be surprising to find a court receptive to the idea that a party was not justified in relying on a lawyer's misrepresentation, at least where the misrepresentation involved nondisclosure rather than active misrepresentation. The justifiable reliance element might also come up in other situations. For example, where a client makes a false assertion of material fact upon which the victim relies, and the client's lawyer simply repeats that assertion, the reliance element may be lacking.[165]

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[161] Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825 (Iowa 2001).

[162] *See, e.g.*, *Fire Ins. Exch.*, 643 N.E.2d at 312 (addressing defendant's argument that attorney had no right to rely on misrepresentations from opposing counsel because of adversarial nature of negotiations and access to relevant facts); McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999) (acknowledging reliances on misrepresentations are generally not recognized when made by attorneys in adversarial contexts).

[163] In *Fire Insurance Exchange v. Bell*, the leading case on the subject, the Indiana Supreme Court rejected the lawyer's argument, noting that "[t]he reliability and trustworthiness of attorney representations constitute an important component of the efficient administration of justice" and that the law "should foster the reliance upon such statements by others." *Fire Ins. Exch.*, 643 N.E.2d at 312-13. *See also Shafer*, 131 Cal. Rptr. 2d at 793-94 (finding that plaintiffs were justified in relying on lawyer's false statements during course of negotiations); *Wright*, 657 N.E.2d at 1231 (citing *Fire Insurance Exchange* and concluding that other side was justified in relying on lawyer's assertions during negotiations).

[164] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmt. b (2000); Richmond, *supra* note 23, at 295.

[165] *Compare* Kristerin Dev. Co. v. Granson Inv., 394 N.W.2d 325, 333 (Iowa 1986) (concluding reliance element was lacking in case against attorney where victim had already relied on client's statements), *with* Am. Family Serv. Corp. v. Michelfelder, 968 F.2d 667, 673 (8th Cir. 1992) (finding liability where lawyer's assertions went

III. ATTORNEY DECEIT STATUTES

Nearly all of the scholarly and judicial discussion of the problem of dishonest conduct in the practice of law has centered around the professional disciplinary process, judicial sanctions, and civil liability. However, statutory law may play at least some role in deterring lawyers from engaging in dishonest practice. Unbeknownst to many lawyers, there are actually statutes on the books in at least a dozen states that specifically target attorney deceit.[166]

A. A Summary of the Various Attorney Deceit Statutes

Statutes singling out attorneys who engage in fraudulent and deceptive behavior have been in existence for quite some time. Chapter 29 of the First Statute of Westminster of 1275 made "deceit or collusion in the king's court, or consent unto it, in deceit of the court" on the part of a lawyer punishable by imprisonment for a year and a day.[167] In addition, the guilty lawyer also lost the right "to plead in that court for any man."[168]

Chapter 29 was one of several chapters of the Statute of Westminster devoted to the problem of misconduct occurring during the judicial process.[169] According to Professor Jonathan Rose, the "chapters were directed at abuses that impacted the operation of the judicial system" including "champerty, extortion, bribery, abuse of official power, maintenance, and abusive litigation practices by royal and court officials, lawyers, and individual litigants."[170] Rose's review of the commentary occurring contemporaneously and subsequent to the enactment of the statute led him to conclude that the primary

beyond simply repeating client's false statements).

[166] CAL. BUS. & PROF. CODE § 6128 (West 2003); IND. CODE ANN. § 33-43-1-8 (West 2010); IOWA CODE ANN. § 602.10113 (West 2009); MINN. STAT. ANN. § 481.07 (West 2002); MINN. STAT. ANN. § 481.071 (West 2002); MONT. CODE ANN. § 37-61-406 (West 2009); NEB. REV. STAT. § 7-106 (2010); N.M. STAT. ANN. § 36-2-17 (West 2010); N.Y. JUD. LAW § 487 (McKinney 2005); N.D. CENT. CODE ANN. § 27-13-08 (West 2009); 21 OKLA. STAT. ANN. tit. X, § 575 (West 2002); S.D. CODIFIED LAWS § 16-18-26 (2010); WYO. STAT. ANN. § 33-5-114 (West 2010). Utah's statute has been repealed. Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 33 (Utah 2003).

[167] EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND Cap. XXIX (1817).

[168] *Id.*

[169] *See* Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 50 (1998).

[170] *Id.* at 53.

concern of Chapter 29 was in addressing lawyer misconduct "because of its negative impact on the justice system."[171]

Rose concludes that the phrase "deceit or collusion" was given an expansive interpretation.[172] According to Rose:

> [T]he cases involved a wide range of lawyer misconduct. The covered conduct included forgery of writs; altering, damaging or removing official documents; conflict of interest and other breaches of client loyalty; false statements to the court, the client, the opponent, and in pleadings and other documents; acting as an attorney without proper authority, or continuing to act after removal; failing to act or premature termination of representation; antagonizing judges by unconvincing arguments, overzealousness, or not speaking in good faith; defective pleadings and documents; unjustified initiation or continuation of litigation, and repleading issues; and misconduct in the lawyer's own litigation or business dealings.[173]

Especially noteworthy is the fact that the application of Chapter 29 was not limited to fraud upon an opposing party, but to instances of fraud upon the court, such as making false statements in pleadings.[174] Up until at least the eighteenth century, British courts continued to view Chapter 29 as addressing fraud upon a court. For example, a decision from 1736 explains that the statute applied to the bringing of a "fictitious suit."[175] Similarly, a 1796 decision from the Court of

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[171] *Id.* at 56.

[172] *Id.* at 58.

[173] *Id.* at 61.

[174] *Id.* at 59. For example, Coke writes:

> Before this statute . . . serjeaunts, apprentices, attorneys, clerks of the kings courts, and others did practice and put in use unlawful shifts and devices so cunningly contrived (and especially in the cases of great men) in deceit of the kings courts, as oftentimes the judges of the same were by such crafty and sinister shifts and practices invegled and beguiled, which was against the common law, and therefore this act was made in affirmance of the common law.

COKE, *supra* note 167, at Cap. XXIX. According to J.H. Baker, the statute was not limited in application to the offense of fraud upon the court. The statute was also used to address a lawyer's breach of the duty of loyalty, including " 'ambidextry,' the offence of taking fees from both sides, or for disclosing counsel to adversaries." J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 187 (1971).

[175] Coxe and Phillip, (1736) 95 Eng. Rep. 152 (K.B.) 153.

King's Bench concluded that introducing fraudulent documents into evidence amounts to a violation of the statute.[176]

There are at least two noteworthy features of the Statute of Westminster with respect to the punishment it provided. First, of course, is the fact that deceit or collusion was made punishable by imprisonment for a year and a day. Also noteworthy is the fact that a lawyer who engaged in deceit or collusion was disqualified for life from pleading in the King's Court.[177] This procedure — known as "silencing" in light of the fact that it resulted in a lawyer's "perpetual silence in the Courts"[178] — represented an early form of legislative control over the practice of law.[179]

There were also specific attempts by legislatures in colonial America to address attorney deceit. At least some of the colonies in America regulated admission to the practice of law by statute, which often contained oaths of office.[180] These oaths sometimes addressed attorney deceit. For example, a 1708 Connecticut statute contained an attorney oath prohibiting an attorney from doing any "falsehood" in court and bringing a "false or unlawful suit."[181] Delaware's 1721 oath of office provided that if attorneys "misbehave[d] themselves" by engaging in deceit or some other conduct prohibited by the oath, "they shall suffer such penalties and suspensions as Attornies at Law in Great Britain are liable to in such cases."[182] Presumably, this would have included the penalties described in the First Statute of Westminster. Some of the

[176] R v. Mawbey, (1796) 101 Eng. Rep. 736 (K.B.) 742.

[177] *See* Rose, *supra* note 169, at 62 (stating statute's "imposition of imprisonment and disbarment as remedies were novel").

[178] *See* Doe, on the demise of Bennett v. Hale and Davis, (1850) 117 Eng. Rep. 423 (K.B.) 428; *see also* R v. Visitors to the Inns of Court, ex p. Calder, [1994] Q.B. 1 at 10 (Eng.) (referring to procedure of silencing).

[179] *See* Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Revolution*, 57 SMU L. REV. 1385, 1394 (2004) ("The first Statute of Westminster in 1275 [is] commonly described as the first formal regulation of English lawyers . . . ."). The statute actually stayed on the books until 1948, when it was repealed. *R v. Visitors to the Inns of Court, ex p. Calder*, [1994] Q.B 1. As officers of the court, attorneys were, at the time of the Statute of Westminster, also subject to disciplinary control by the courts. BAKER, *supra* note 174, at 66.

[180] Andrews, *supra* note 179, at 1417.

[181] JOSIAH HENRY BENTON, THE LAWYER'S OFFICIAL OATH AND OFFICE 42 (1909); *see also id.* at 70-72 (listing 1791 New Hampshire statute containing oath of office with similar language).

[182] BENTON, *supra* note 181, at 45. Similar language existed in other colonial statutes of the time. *See id.* at 91 (reproducing 1722 Pennsylvania statute).

former colonies also provided for judicial removal of attorneys who engaged in deceit and other forms of misconduct.[183]

In 1787, the New York legislature enacted a statute similar to Chapter 29 of the First Statute of Westminster.[184] The New York legislature appears to have relied heavily upon the language of the thirteenth-century English statute in criminalizing an attorney's deceit or collusion with the intent to deceive the court or party.[185] However, New York's statute added one interesting component: treble damages. In addition to imprisonment, a lawyer found guilty under the statute was required to "pay to the party grieved, treble damages."[186] The language of the statute changed with subsequent recodifications through the nineteenth century, but the provisions making attorney deceit a crime punishable by imprisonment and permitting a party injured by a lawyer's deceit or collusion to recover treble damages in a civil action remained a constant.[187]

Other states — mainly in the West and Midwest — eventually followed New York's lead, using New York's statute as a model.[188] Some states retained the essential features of New York's penal statute, while others made modifications. For example, California's legislature chose to make it a misdemeanor for an attorney to engage in "any deceit or collusion, or consent[] to any deceit or collusion, with intent to deceive the court or any party," but did not provide for recovery of

[183] For example, Professor Carol Rice Andrews notes that an 1836 Massachusetts statute provided for the courts' removal of lawyer for engaging in "deceit, malpractice or other gross misconduct." Andrews, *supra* note 179, at 1416 n.215. A 1792 Virginia statute "provided for judicial discipline over attorneys guilty of 'malpractice.' " *Id.* at 1417 n.219. Other state statutes similarly provided for judicial removal of lawyers who engaged in "malpractice" or similar misconduct. *See* BENTON, *supra* note 181, at 74-75 (describing New Jersey statue).

[184] *See* Amalfitano v. Rosenberg, 903 N.E.2d 265, 267 (N.Y. 2009) (noting "strikingly similar language" of two statutes).

[185] *See* BENTON, *supra* note 181, at 84 (noting that relevant provisions of New York's statute "practically embody" provisions of Statute of Westminster).

[186] *Amalfitano*, 903 N.E.2d at 267 (quoting L. 1787, ch. 35, § 5). In addition, the statute provided that the guilty attorney would also pay the costs of suit. *Id.*

[187] *Id.*

[188] *See* THE PENAL CODE OF THE STATE OF CALIFORNIA § 160 (James H. Deering ed., 1915) (noting statute was based on New York's statute); *see also* Baker v. Ploetz, 616 N.W.2d 263, 270 (Minn. 2000) (noting Minnesota's "extensive adoption" in 1885 of New York's statute). Some state legislatures appear to have borrowed from California's statute, LaFountaine v. State Farm Mut. Auto. Ins. Co., 698 P.2d 410, 413 (Mont. 1985), which was itself borrowed from New York. North Carolina had a similar attorney deceit statute, which likewise included a treble damages provision, in place in 1792. BENTON, *supra* note 181, at 86-87.

treble damages in a civil action.[189] In contrast, Iowa's statute failed to criminalize an attorney's intentional deceit or collusion but did provide that the attorney "is liable to be disbarred, and shall forfeit to the injured party treble damages to be recovered in a civil action."[190]

Today, at least twelve jurisdictions have attorney deceit statutes in place.[191] New York's statute, section 487 of the Judiciary Law, is typical:

> An attorney or counselor who:
>
> > 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
> >
> > 2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
> >
> > Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.[192]

The majority of jurisdictions designate such conduct a misdemeanor and allow an injured party to recover treble damages in a civil action.[193] A few provide for recovery of treble damages by an injured party and mention the possibility of disbarment for the offending

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[189] THE PENAL CODE OF THE STATE OF CALIFORNIA § 160 (James H. Deering ed., 1915).

[190] IOWA CODE ANN. § 602.10113 (West 2010).

[191] CAL. BUS. & PROF. CODE § 6128 (West 2003); IND. CODE ANN. § 33-43-1-8 (West 2010); IOWA CODE ANN. § 602.10113 (West 2010); MINN. STAT. ANN. § 481.07 (West 2002); MINN. STAT. ANN. § 481.071 (West 2002); MONT. CODE ANN. § 37-61-406 (West 2009); NEB. REV. STAT. ANN. § 7-106 (2010); N.M. STAT. ANN. § 36-2-17 (West 2010); N.Y. JUD. LAW § 487 (McKinney 2005); N.D. CENT. CODE ANN. § 27-13-08 (West 2009); 21 OKLA. STAT. ANN. tit. X, § 575 (West 2002); S.D. CODIFIED LAWS § 16-18-26 (2010); WYO. STAT. ANN. § 33-5-114 (West 2010). Utah's statute has been repealed. Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 33 (Utah 2003).

[192] N.Y. JUD. LAW § 487; *see* IND. CODE ANN. § 33-43-1-8. Some jurisdictions do not specifically prohibit an attorney from willfully delaying a client's suit with a view to the lawyer's own gain as does New York's Judiciary Law § 487(2). IND. CODE ANN. § 33-43-1-8; IOWA CODE ANN. § 602.10113; MONT. CODE ANN. § 37-61-406; N.M. STAT. ANN. § 36-2-17. Every statute, however, prohibits an attorney from engaging in deceit or collusion, or consenting thereto, with the intent to deceive.

[193] *See* IND. CODE ANN. § 33-43-1-8; MINN. STAT. ANN. § 481.07; MONT. CODE ANN. § 37-61-406; N.Y. JUDICIARY LAW § 487; N.D. CENT. CODE ANN. § 27-13-08; OKLA. STAT. ANN. tit. X, § 21-19-575 (2002).

attorney, but do not criminalize the deceit or collusion.[194] Two designate such conduct a misdemeanor but make no mention of disbarment or treble damages.[195] One (Nebraska) simply advises that a lawyer who engages in such conduct is subject to disbarment.[196] All told, nine of the statutes provide for the recovery of treble damages in a civil action, and seven classify attorney deceit or collusion a misdemeanor.

B. The Interpretation of the Statutes

Until recently, there had been relatively little case law dealing with the interpretation of these attorney deceit statutes.[197] Although nearly all courts have interpreted the statutory language in a fairly restrictive fashion, they have done so in some different and unusual ways. However, in 2009, one state, New York, strayed from the herd and interpreted its attorney deceit statute in a manner more likely to lead to attorney liability.

1. The Majority Approach

Most jurisdictions have interpreted their attorney deceit statutes so as to limit the potential for liability. The most common method of limiting the reach of the statutes has been to hold that the statutes do not create a new cause of action but simply codify the common law fraud or misrepresentation tort while providing for treble damages.[198] In the words of the Minnesota Supreme Court, "The common law gives the right of action and the statute the penalty."[199]

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[194] *See* IOWA CODE ANN. § 602.10113; N.M. STAT. ANN. § 36-2-17; WYO. STAT. ANN. § 33-5-114.

[195] CAL. BUS. & PROF. CODE § 6128; S.D. CODIFIED LAWS § 16-18-26.

[196] NEB. REV. STAT. ANN. § 7-106.

[197] *See generally* Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 33 (Utah 2003) (stating that "[i]n the more than one hundred years [Utah's statute] has been in existence, neither Utah appellate court has been presented with a case requiring its interpretation"). Utah's statute has since been repealed. *Id.*

[198] *See* Anderson v. Anderson, 399 N.E.2d 391, 403 (Ind. Ct. App. 1979); *Bennett*, 70 P.3d at 33.

[199] Love v. Anderson, 61 N.W.2d 419, 422 (Minn. 1953); *see also* Loomis v. Ameritech Corp., 764 N.E.2d 658, 666-67 (Ind. Ct. App. 2002) (holding that Indiana's attorney deceit statute "does not create a new cause of action but, instead, trebles the damages recoverable in an action for deceit"). This same general issue of whether the statute simply codifies the common law action of fraud or deceit has arisen under federal securities law as well. *See* Paula J. Dalley, *From Horse Trading to Insider Trading: The Historical Antecedents of the Insider Trading Debate*, 39 WM. & MARY L. REV. 1289, 1294 (1998).

This is significant because, as discussed, plaintiffs asserting common law fraud claims based upon a fraud upon the court have had little success due to their inability to establish that they justifiably relied on any of the defendant's false statements to their detriment.[200] Thus, under the majority approach, a plaintiff would have neither a statutory nor common law fraud claim against a lawyer who, for example, knowingly allowed a witness to testify falsely.[201] Nor would a plaintiff have a claim against an attorney who tricked a witness into providing false testimony to the plaintiff's detriment.[202]

In the case of fraud upon a client or an opposing party, courts have similarly limited the reach of the statutes in ways that make recovery under these circumstances difficult. First, because, under the majority approach, the statutes simply track common law fraud claims, plaintiffs are still required to establish that they justifiably relied on an attorney's misrepresentations to their detriment.[203] This requirement may potentially limit the ability of a client to recover, but would also seem to make it especially difficult for an adverse party to recover.[204] Even if a plaintiff is able to overcome the reliance hurdle, she still must satisfy the other elements of a common law fraud claim. Thus, a client who has been the victim of her lawyer's negligence or breach of fiduciary duty is unlikely to have a claim under the statutes because the statutes require an actual intent to deceive.[205] In addition, because common law fraud requires proof of damages, a plaintiff must establish that the fraud resulted in damages before treble damages may be awarded under the statutes.[206]

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[200] *See supra* notes 104-05, 137 and accompanying text.

[201] *See* Hutchinson v. Carter, 33 P.3d 958, 961 (Okla. Civ. App. 2001) (explaining that misrepresentations to court are not actionable under fraud theory).

[202] *See Loomis*, 764 N.E.2d at 667.

[203] *See, e.g.*, *Love*, 61 N.W.2d at 422 (dismissing claim failing to allege reliance upon fraud resulting in pecuniary damage).

[204] *See* Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 34 (Utah 2003) (holding that client's fraud claim against his lawyers failed due to client's failure to rely on lawyers' misrepresentations).

[205] *See* Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannahan, 494 N.W.2d 261, 268 (Minn. 1993) (holding that legal malpractice cannot be basis for statutory claim of attorney deceit); Gilchrist v. Perl, 387 N.W.2d 412, 419 (Minn. 1986) (holding constructive fraud resulting from breach of fiduciary duty is not actionable under Minnesota's statute); *see also* Anderson v. Anderson, 399 N.E.2d 391, 403 (Ind. Ct. App. 1979) (stating that there must be intent to deceive before recovery under statute is permitted).

[206] *See Anderson*, 399 N.E.2d at 403; Clark Bros. v. Anderson & Perry, 234 N.W. 844, 846 (Iowa 1931).

Courts have limited the reach of the statutes in other ways. In jurisdictions that classify attorney deceit as a misdemeanor, the statutes are criminal in nature.[207] As such, some courts have held that they are subject to the rule of construction that penal statutes must be narrowly construed.[208] Several jurisdictions have concluded that a cause of action arises under the statute only when an attorney is actually acting as an attorney,[209] or — even more narrowly — when an attorney acts as an attorney in the course of a judicial proceeding.[210] Thus, for example, when an attorney makes false representations in connection with a real estate closing, the victim would not have a statutory cause of action because the deceit did not occur in the course of a judicial proceeding.[211] This approach might also prohibit a plaintiff who had been tricked by a lawyer prior to the filing of an action from proceeding on a statutory claim.[212]

Some courts have narrowed the reach of the statute by holding that only nonclients have a remedy; a client who is the victim of her own attorney's deceit has no statutory remedy.[213] In Oklahoma, there must first be a criminal conviction under the statute before a victim is entitled to bring a civil claim.[214] This prerequisite is significant because there are few reported decisions involving criminal prosecutions under the statutes, thus suggesting that prosecutions are fairly rare.[215] The

[207] *See* Baker v. Ploetz, 616 N.W.2d 263, 272 (Minn. 2000).

[208] *See id.*

[209] *See Anderson*, 399 N.E.2d at 403 (holding that plaintiff must show that lawyer acted in his capacity as lawyer, not in individual capacity or as party litigant).

[210] *See* Richter v. Van Amberg, 97 F. Supp. 2d 1255, 1260 (D.N.M. 2000); Mohr v. State Bank of Stanley, 770 P.2d 466, 476 (Kan. 1989); Eaton v. Morse, 687 P.2d 1004, 1010 (Mont. 1984); Abel v. Conover, 104 N.W.2d 684, 693 (Neb. 1960); Bank of India v. Weg & Myers, P.C., 691 N.Y.S.2d 439, 446 (N.Y. App. Div. 1999).

[211] *See Richter,* 97 F. Supp. 2d at 1260.

[212] *See, e.g.*, *Abel*, 104 N.W.2d at 693 (holding statute did not apply since deceit occurred at time when there was no suit pending); Looff v. Lawton, 97 N.Y. 478, 482 (N.Y. 1884) (concluding that statute only applies when deceit takes place while there is suit actually pending in court).

[213] *See* Eaton v. Morse, 687 P.2d 1004, 1010 (Mont. 1984).

[214] Patel v. OMH Med. Ctr., Inc., 987 P.2d 1185, 1201 n.61 (Okla. 1999); Hutchinson v. Carter, 33 P.3d 958, 961 (Okla. Civ. App. 2001); *see also* Wiggin v. Gordon, 455 N.Y.S.2d 205, 208-09 (N.Y. Civ. Ct. 1982) (holding same with respect to New York's statute). *But see* Bjorgen v. Kinsey, 466 N.W.2d 553, 559 (N.D. 1991) (holding that prior criminal conviction is not prerequisite to recovery under North Dakota's statute).

[215] The decisions appear to be confined — either largely or in toto — to New York. *See* People v. Canale, 658 N.Y.S.2d 715, 718 (N.Y. App. Div. 1997) (dismissing indictment); *In re* Piastra, 570 N.Y.S.2d 353, 353 (N.Y. App. Div. 1991) (noting fact of lawyer's conviction in disciplinary proceeding); *In re* Tirelli, 529 N.Y.S.2d 12, 13 (N.Y.

condition precedent of a criminal conviction would, therefore, seem to limit dramatically the potential for plaintiffs to pursue civil actions. Finally, a handful of jurisdictions have held that despite the existence of their jurisdiction's statute specifically singling out attorneys who engage in intentional deceit, the absolute litigation privilege that applies in the tort context applies to a claim based on the statute.[216]

Plaintiffs have occasionally had success under these statutes. For example, in a Montana case, a lawyer successfully deceived the clerk of court into believing that he was entitled to a default judgment against the opposing side.[217] After the other side had the default judgment set aside, it brought suit under Montana's attorney deceit statute and successfully recovered for the additional time and expense it incurred as result of the lawyer's deceit.[218] The case is noteworthy for the fact that it is one of the few instances in which a party was able to prevail under an attorney deceit statute for fraud directed at the court, rather than the party itself. Generally speaking, however, existing attorney deceit statutes — either as a result of disuse or restrictive court interpretations — have provided little in the way of remedies for parties who have suffered as a result of a lawyer's deceit or attempted deceit.

2. The New York Approach

Prior to 2009, New York courts generally interpreted and applied section 487 of New York's Judiciary Law in much the same manner that other jurisdictions interpreted their own attorney deceit statutes. Consistent with the majority approach, New York courts concluded that the statute tracked the common law tort of fraud or misrepresentation, thus requiring justifiable reliance resulting in

App. Div. 1988) (same); *In re* Scuccimarra, 418 N.Y.S.2d 132, 133 (N.Y. App. Div. 1979) (same).

[216] *See, e.g.*, Janklow v. Keller, 241 N.W.2d 364, 370 (S.D. 1976) (holding that absolute privilege requires dismissal of deceit claim); Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 34 (Utah 2003) (using common law judicial proceeding privilege to bar deceit claim). This result would seem to conflict with the rule of construction calling that particular provisions should prevail over general provisions. *See* Action Apartment Ass'n, Inc. v. City of Santa Monica, 163 P.3d 89, 98 (Cal. 2007) (concluding litigation privilege does not apply to California's attorney deceit statute for this reason).

[217] LaFountaine v. State Farm Mut. Auto. Ins. Co., 698 P.2d 410, 411 (Mont. 1985).

[218] *Id.* at 413; *see also* Bjorgen v. Kinsey, 466 N.W.2d 553, 554, 559 (N.D. 1991) (affirming jury's finding of treble damages in amount of $526,964.30 based on fraud upon client).

damages.[219] Indeed, some New York courts had adopted an especially restrictive interpretation of the statute, stating that the statute's application "must be carefully reserved for the extreme pattern of legal delinquency," despite the fact that this language does not appear in the statute.[220] Not surprisingly, plaintiffs generally had little success with their section 487 claims.[221]

Things changed in February 2009 with the New York Court of Appeals's decision in *Amalfitano v. Rosenberg*.[222] *Amalfitano* involved a claim brought in federal court by the Amalfitanos. In the underlying state claim, a lawyer, Rosenberg, on behalf of his clients, had filed a complaint containing false allegations against the Amalfitanos.[223] In addition to knowingly including false allegations in the complaint, Rosenberg knowingly made false representations in a motion for summary judgment and submitted an affidavit containing false statements to the state trial court.[224] The trial court granted the Amalfitanos' motion to dismiss the fraud claim.[225] In appealing the dismissal, Rosenberg again submitted the false affidavit and several erroneous documents to the appellate court.[226] The appellate court was deceived by Rosenberg's actions and reversed the trial court's order.[227] The trial court — not deceived by Rosenberg's actions — once again granted the Amalfitanos' motion to dismiss following pretrial discovery.[228]

The Amalfitanos then brought a section 487 claim against Rosenberg in federal court. The plaintiffs' claim essentially consisted of two parts: a claim that Rosenberg attempted, but failed to complete, a fraud upon the trial court and a claim that Rosenberg successfully

[219] *See* Dupree v. Voorhees, 876 N.Y.S.2d 840, 844-45 (N.Y. Sup. Ct. 2009) (referencing prior decisions).

[220] Wiggin v. Gordon, 455 N.Y.S.2d 205, 207 (N.Y. Civ. Ct. 1982); *see also* Amalfitano v. Rosenberg, 533 F.3d 117, 123 (2d Cir. 2008) (citing cases using similar language and noting that requirement "appears nowhere in the text of the statute").

[221] *See* Andrew Lavoott Bluestone, *The Use of Lawyer-Targeted Judiciary Law § 487*, 241 N.Y. L.J. 4, 4 (2009) ("Far more common than successful section 487 cases are the unsuccessful cases.").

[222] Amalfitano v. Rosenberg, 903 N.E.2d 265, 265 (N.Y. 2009).

[223] *Id.* at 266.

[224] Amalfitano v. Rosenberg, 533 F.3d 117, 124 (2d Cir. 2008).

[225] *Id.* at 121.

[226] *Id.* at 121, 124. Rosenberg engaged in various other forms of misconduct, including failing to correct his client's false deposition testimony and apparently attempting to mislead the Amalfitanos into believing that he possessed a highly damaging audio recording. *Id.* at 122.

[227] *Id.* at 121.

[228] *Id.*

committed a fraud upon the appellate court.[229] Had the plaintiffs been forced to rely on a common law fraudulent misrepresentation theory, the claims would almost certainly have failed because (a) only the appellate court, and not the plaintiffs, relied on Rosenberg's misrepresentations, and fraud upon the court is not actionable under a misrepresentation theory, and (b) even if such fraud upon the court were actionable, there was no justifiable reliance on the part of the trial court in the underlying litigation because the trial court was not deceived by Rosenberg's actions.[230] Fortunately for the Amalfitanos, section 487 potentially provided another avenue for recovery.

The district court initially found for the Amalfitanos and assessed damages in the amount of $89,415.18, comprising the Amalfitanos' legal fees from the beginning of the underlying litigation to the end.[231] Consistent with section 487, the court then trebled the award to $268,245.54.[232] On appeal, the Second Circuit affirmed that part of the award pertaining to Rosenberg's successful deceit of the appellate court.[233] However, it questioned whether Rosenberg's attempted, but unsuccessful deceit of the trial court was actionable under the statute. Thus, the Second Circuit Court of Appeals certified two questions to the New York Court of Appeals:

> (1) Can a successful lawsuit for treble damages brought under N.Y. Jud. Law § 487 be based on an attempted but unsuccessful deceit . . . ?
>
> (2) In the course of such a lawsuit, may the costs of defending litigation instituted by a complaint containing a material misrepresentation of fact be treated as the proximate result of the misrepresentation if the court upon which the deceit was attempted at no time acted on the belief that the misrepresentation was true?[234]

Regarding the first certified question, the New York Court of Appeals concluded that reliance on an attorney's misrepresentation is

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[229] *Id.*

[230] *See supra* notes 104-05, 137 and accompanying text; *see also* Amalfitano v. Rosenberg, 903 N.E.2d 265, 267 (N.Y. 2009) (noting that New York common law requires that, *inter alia*, plaintiff show that plaintiff was deceived and damaged by defendant's misrepresentation).

[231] *Amalfitano*, 533 F.3d at 122.

[232] *Id.*

[233] *Id.* at 125.

[234] *Id.* at 126.

not an essential element of the statutory claim.[235] In reaching this conclusion, the court traced the history of section 487 back to First Statute of Westminster. The court noted that in 1787 the New York legislature enacted a statute "with strikingly similar language," and that the legislature — through various incarnations of the statute — had continued to employ roughly the same basic language over the following two centuries.[236] Thus, the court concluded, section 487 is not simply a codification of the common law tort of fraud, but "a unique statute of ancient origin in the criminal law of England."[237] As such, criminal law, rather than civil law, provided the more appropriate context for analysis.[238] With criminal law principles guiding its analysis, the court noted that criminal law makes the attempt to commit an underlying offense punishable.[239] In the court's view, the operative language of the statute — "guilty of any deceit" — "focuses on the attorney's intent to deceive, not the deceit's success."[240]

Further guiding the court in this direction was another aspect of section 487's legislative history. The *Amalfitano* court noted that the language of an older version of New York's Code of Civil Procedure contained essentially the same language as found in one of section 487's predecessors. The derivation accompanying this section referred to the 1878 case of *Looff v. Lawton* to understand the meaning of "deceit."[241] *Looff* concluded that, because there was already a civil action for fraud available, the legislature did not intend simply to codify the common law. Instead, the legislature must have intended a broader meaning to the term "guilty of any deceit." This conclusion was bolstered by the fact that the statute targeted a specific class of individuals — lawyers — "from whom the law exacts a reasonable degree of skill, and the utmost good faith in the conduct and management of the business intrusted to them."[242] As such, the court concluded that the statute covered instances of fraud upon the court: "To mislead the court or a party is to deceive it; and, if knowingly done, constitutes criminal deceit under the statute cited."[243]

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[235] *Amalfitano*, 903 N.E.2d at 269.
[236] *Id.* at 267-68.
[237] *Id.* at 268.
[238] *Id.* at 269.
[239] *Id.*
[240] *Id.* at 268.
[241] *Id.*
[242] Looff v. Lawton, 14 Hun 588, 590 (2d Dept. 1878).
[243] *Id.*

Based on the reasoning of *Looff* and section 487's overall legislative history, the *Amalfitano* court concluded that the New York legislature intended an "expansive reading" of the statutory language.[244] The court held that "to limit forfeiture under section 487 to successful deceits would run counter to the statute's evident intent to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function."[245] Thus, in answering the federal court's first certified question, the New York Court of Appeals concluded that an action for treble damages under section 487 may be based on an attempted but unsuccessful deceit of a court.

The court's answer to the first certified question essentially dictated the answer to the second certified question. The court concluded that:

> [w]hen a party commences an action grounded in a material misrepresentation of fact, the opposing party is obligated to defend or default and necessarily incurs legal expenses. Because, in such a case, the lawsuit could not have gone forward in the absence of the material misrepresentation, that party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation.[246]

Thus, assuming the misrepresentations in a complaint or motion are material, a party forced to defend against the complaint or motion is entitled to recover triple the legal expenses incurred under *Amalfitano*.

Since *Amalfitano*, plaintiffs appear to have had greater success with their section 487 claims. Although some plaintiffs have lost for a variety of reasons,[247] others have prevailed when they almost certainly would not have before. For example, *Dupree v. Voorhees*[248] involved a party's claims against the other side's lawyers for misrepresentations made during a divorce action. These misrepresentations resulted in the court granting an order against the plaintiff's interests, which required the plaintiff to expend "tens of thousands of dollars on additional legal fees to rectify matters."[249] The plaintiff brought a

[244] *Amalfitano*, 903 N.E.2d at 268.

[245] *Id.* at 269.

[246] *Id.*

[247] *See, e.g.*, God's Battalion of Prayer Pentecostal Church, Inc. v. Hollander, No. 001056, 2009 WL 2960629, at *8 (N.Y. Sup. Ct. Aug. 27, 2009) (concluding that preventing access to witness does not qualify as prohibited deceit within meaning of statute); Connolly v. Napoli Kaiser & Bern, No. 105224/05, 2009 WL 2350275, at *6-8 (N.Y. Sup. Ct. July 16, 2009) (concluding that statute does not apply to lawyer's act of lying during deposition because plaintiff was not party to proceeding).

[248] 876 N.Y.S.2d 840, 840 (N.Y. Sup. Ct. 2009).

[249] *Id.* at 842.

section 487 claim, which the trial court initially dismissed based on prior New York case law.[250] After reconsidering the matter in light of the *Amalfitano* decision, however, the court concluded that the plaintiff had stated a viable claim.[251] Since *Amalfitano*, plaintiffs have managed to avoid dismissal of or succeeded on their section 487 claims in several other instances, including an instance in which the defendant knowingly allowed his client to testify falsely in a proceeding.[252]

IV. THE MEANING OF *AMALFITANO* AND THE POTENTIAL SIGNIFICANCE OF ATTORNEY DECEIT STATUTES

With *Amalfitano*, the New York Court of Appeals dramatically changed the traditional understanding of New York Judiciary Law section 487. But what, if anything, does the decision signify beyond the borders of New York? And, more generally, what is the significance of other existing attorney deceit statutes in light of *Amalfitano*? Are they likely to remain simply outdated relics tucked neatly away in the statutory law of some states or might they have some potential use in the regulation of lawyer conduct? The following Part explores several possible conceptions of the *Amalfitano* decision and considers what role, if any, attorney deceit statutes or the principles underlying them should have in the regulation of lawyers.

A. Amalfitano *as Revolutionary Change*

Amalfitano has the potential to bring about a dramatic change in the law governing lawyers in those jurisdictions with similar attorney deceit statutes. The decision could potentially expand tort liability for lawyers in a variety of contexts. In theory, the decision could also influence other jurisdictions that have their own attorney deceit statutes.

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[250] *Id.* at 844.

[251] *Id.* at 847.

[252] *See* Koch v. Sheresky, Aronson & Mayefsky LLP, No. 0112337/2007, 2009 WL 2135138, at *23-24 (N.Y. Sup. Ct. July 7, 2009); *see also* Mokay v. Mokay, 889 N.Y.S.2d 291, 294 (N.Y. App. Div. 2009) (allowing claim to proceed where defendant engaged in scheme to deprive client of property agreed upon in divorce settlement); Cinao v. Reers, 893 N.Y.S.2d 851, 859 (N.Y. Sup. Ct. 2010) (holding that statute applies to attorney deceit committed upon court outside New York by New York attorney).

1. The Persuasive Effect of *Amalfitano*

New York's attorney deceit statute is the source of most of the attorney deceit statutes in the United States.[253] Although New York's highest court had not expressed an opinion as to the precise meaning of the phrase "intent to deceive" at the time most jurisdictions began borrowing the language of New York's statute,[254] there is the derivation note accompanying an earlier version of the statute in 1881 noting the construction given to the statute by the General Term of the New York Supreme Court in *Looff* that section 487 covered forms of attorney deceit that would not be actionable at common law.[255] Moreover, other decisional law from New York around this time bolsters the idea that this was the prevailing understanding of the statute. An 1897 decision from the Special Term of the New York Supreme Court, relying on *Looff*, concluded that:

> [W]hen a person uses means which are deceitful, or which tend to deceive the court or another person, such as lying or producing false papers, it would be too strict a definition to hold that although he intended to deceive, but as he failed in accomplishing any result, he was not in fact guilty of using deceit.[256]

Thus, under generally accepted interpretive principles, these decisions should arguably be particularly persuasive in determining the meaning of the statutory language in jurisdictions that borrowed New York's language around that time.[257] Indeed, courts have

[253] *See supra* note 188 and accompanying text.

[254] When a legislature borrows statutory language from another jurisdiction after the highest court of that jurisdiction has construed the language, there is a presumption that the borrowing jurisdiction adopts the same construction. Baker v. Ploetz, 616 N.W.2d 263, 271 (Minn. 2000). Applying this well-established principle of construction, had the New York Court of Appeals considered that precise question, its holding would be presumed to be adopted by any borrowing jurisdictions. The New York Court of Appeals did consider the meaning of the language contained in one of section 487's predecessors. Looff v. Lawton, 97 N.Y. 478, 478 (1884). In that case, the Court of Appeals concluded only that the statute did not apply unless the deceit occurred while a judicial proceeding was pending. *Id.* It did not address the more basic question of what was meant by the term "intent to deceive." Thus, the borrowed statute canon of construction is technically not applicable.

[255] *See supra* note 241 and accompanying text.

[256] People v. Oishei, 45 N.Y.S. 49, 52 (N.Y. Sup. Ct. 1897).

[257] *See generally* Baker v. Ploetz, 616 N.W.2d 263, 271 (Minn. 2000) (noting importance of pre-existing New York law when ascertaining meaning of Minnesota's statute).

routinely looked to older New York decisional law on this subject while interpreting their own attorney deceit statutes.[258]

Going further back in time, the original source of attorney deceit statutes appears to have been the First Statute of Westminster from over seven centuries ago.[259] That statute was applied in an expansive manner and even understood to cover a variety of forms of attorney misconduct not involving "deceit" in the traditional sense, including breaches of client loyalty and confidentiality.[260] All of this suggests that the *Amalfitano* court's interpretation of the statutory language is more historically accurate than that of the majority of jurisdictions. As the statutes existing in other jurisdictions can be traced directly to a body of law permitting deceit claims against attorneys in the absence of any reliance on the party of a victim, there is a plausible argument that this interpretation should prevail in other jurisdictions as well.

In addition, there is the reality that *Amalfitano*'s interpretation of the statutory language is more consistent with the text than is the majority approach. New York's statute — like most — provides a remedy to a "party injured" by an attorney who acts "with intent to deceive the court or any party."[261] By its terms, then, if an attorney's deceit upon "the court" injures a party, that party is entitled to the remedy provided.[262] The majority approach, which does not allow recovery in the case of fraud upon the court, is inconsistent with the plain language of the statute. In addition, consistent with well-established principles of construction, the statute's use of the word "any" to modify the words "deceit or collusion" suggests an expansive interpretation of those terms.[263] Thus, *Amalfitano*'s interpretation of section 487 is also more faithful to the statutory text than is the majority approach.

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[258] *See, e.g.*, *id.* (noting importance of pre-existing New York law when ascertaining meaning of Minnesota's statute); Bjorgen v. Kinsey, 466 N.W.2d 553, 559 (N.D. 1991) (relying on Wiggin v. Gordon, 455 N.Y.S.2d 205 (N.Y. Civ. Ct. 1982)).

[259] *See supra* note 236 and accompanying text.

[260] *See* Andrews, *supra* note 179, at 1395.

[261] N.Y. JUDICIARY LAW § 487 (McKinney 2005).

[262] *Id.*

[263] Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007); (emphasizing broad definition of statutory term as underscored by use of the word "any" to modify term); Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) (noting the word " 'any' has an expansive meaning . . ."); United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning . . . .").

2. Tort Claims Involving Deceit in Motion Practice

If courts in the other jurisdictions with similar statutes were willing to follow this line of reasoning, the results would potentially be quite dramatic. As *Amalfitano* itself demonstrates, statutory deceit claims based on the filing of false claims or motions containing false assertions might succeed where malicious prosecution claims would probably fail. New York is one of those jurisdictions requiring that a malicious prosecution plaintiff establish that the defendant's wrongful initiation of a civil proceeding resulted in a special injury. The New York Court of Appeals has defined "special injury" as "concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit."[264] *Amalfitano* rejects any special injury requirement in the context of a section 487 claim and specifically permits a plaintiff to recover for the financial demands of defending a lawsuit. Thus, a section 487 claim is an attractive alternative to a malicious prosecution claim for plaintiffs.

Amalfitano also opens the door to the use of attorney deceit statutes as a substitute for abuse of process and malicious defense claims. In *Dupree v. Voorhees*, section 487 provided the plaintiff with a potential remedy for a lawyer's false statements made in connection with the filing of a motion when the court dismissed the plaintiff's abuse of process claim.[265] And while few jurisdictions have been willing to recognize malicious defense claims, it is difficult to see how knowingly making false assertions during the defense of a claim would not be classified as "deceit" under *Amalfitano*'s standard.

Amalfitano's broad approach might also provide plaintiffs with a way around the litigator's absolute privilege in the defamation context. The plaintiffs in *Amalfitano* sued over the false allegation contained in a lawsuit that they had fraudulently purchased a business.[266] This allegation was almost certainly defamatory.[267] However, because lawyers enjoy an absolute privilege with respect to false and defamatory statements made in connection with the initiation of a judicial proceeding, a defamation action would have failed.[268] The

[264] Engel v. CBS, Inc., 711 N.E.2d 626, 631 (N.Y. 1999).

[265] *Cf.* Dupree v. Voorhees, 876 N.Y.S.2d 840 (N.Y. Sup. Ct. 2009) (recognizing validity of plaintiff's statutory deceit claim, but noting failure of plaintiff's abuse of process claim).

[266] Amalfitano v. Rosenberg, 903 N.E.2d 265, 266 (N.Y. 2009).

[267] "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977).

[268] *See, e.g.*, Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 901 (Tex.

Amalfitano decision contains no reference to this immunity issue, thus leading one to believe that the court did not believe that the general common law privilege should trump the specific statutory prohibition on attorney deceit. Regardless, as a matter of statutory interpretation, the specific statutory prohibition should arguably trump the more general common law privilege.[269] Thus, in theory, an interpretation of an attorney deceit statute consistent with the *Amalfitano* approach might essentially eliminate the longstanding absolute litigator's privilege in the context of false and defamatory statements made in motion practice.

3. Tort Claims Involving Deceit in the Discovery Process and in the Presentation of Evidence

Amalfitano's expansive approach could also have potentially dramatic consequences for instances of attorney deceit occurring during the discovery process and in the presentation of evidence. Consider the case of *Loomis v. Ameritech Corp.*,[270] an otherwise nondescript case from Indiana involving allegations of attorney deceit during the discovery process. The plaintiffs in *Loomis* alleged that an attorney for the opposing party in a personal injury action made false statements to a witness in an attempt to turn the witness against one of the plaintiffs. The intended and successful result of this deceit was to induce the witness to sign false statements in an affidavit the attorney prepared that would be damaging to the plaintiffs' case.[271] The statements in the affidavit conflicted with the witness's more supportive deposition testimony, thus enabling the attorney to move to strike the witness's deposition testimony.[272] The plaintiffs alleged various theories of liability, including intentional interference with civil litigation by spoliation of evidence, common law fraud or deceit, and a statutory deceit claim, all of which the trial court dismissed on the defendants' 12(b)(6) motion.[273]

On appeal, the Indiana Court of Appeals affirmed the lower court's decision. The court dismissed the spoliation of evidence claim, reasoning that even if the spoliation of evidence tort were recognized

2000) (applying "traditional statutory construction principle that the more specific statute controls over the more general").

[269] *See, e.g.*, *id.* (stating traditional statutory construction principle).

[270] 764 N.E.2d 658, 658 (Ind. Ct. App. 2002).

[271] *Id.* at 661.

[272] *Id.*

[273] *Id.* at 662, 666-67.

in the state,[274] it did not extend to include procuring false testimonial evidence.[275] The Court of Appeals also affirmed the dismissal of the common law fraud claim, reasoning that the plaintiffs had failed to allege that they ever relied on any of the false statements the attorney had made to the witness.[276] "Fraud against a witness," the court explained, "does not equate to fraud against a party."[277] Finally, the court affirmed the dismissal of the statutory deceit claim, reasoning that the statute did not create a new cause of action but instead simply trebled the damages available in a common law fraud action. And since the fraud action failed, so too did the statutory action.[278]

Were the Indiana Supreme Court to follow *Amalfitano* to its logical conclusion, each of the plaintiffs' claims in *Loomis* would likely have survived the motion to dismiss. Fraud upon a witness — while perhaps insufficient to amount to common law fraud — is nonetheless a form of deceit that may have adversely affected the plaintiffs' underlying lawsuit. Similarly, preparing an affidavit containing false statements and then relying on that affidavit in the course of making a motion is also unquestionably the type of deceit the *Amalfitano* court envisioned as being actionable under its "expansive" interpretation of the statute. Indeed, the defendant in *Amalfitano* actually submitted false affidavits in support of a motion.[279] Attorney deceit statutes would also naturally seem to cover the more obvious situation in which an attorney concealed or destroyed relevant evidence during discovery.

Knowingly allowing a witness to commit perjury in a civil matter would also likely be actionable under an attorney deceit statute in a jurisdiction that adopted *Amalfitano*'s expansive approach. Again, fraud upon a court or jury — while not actionable under common law — is still a form of fraud or deceit in the sense of involving an attempt to trick the judge or jury. Accordingly, the *Amalfitano* interpretation would reverse the nearly universal rule that there is no civil remedy for perjury.

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[274] The Indiana Supreme Court has since refused to recognize spoliation as an independent tort. Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349, 355 (Ind. 2005).

[275] *Loomis*, 764 N.E.2d at 662.

[276] *Id.* at 667.

[277] *Id.*

[278] *Id.*

[279] *See* Amalfitano v. Rosenberg, 533 F.3d 117, 121-22 (2d Cir. 2008); *supra* notes 225-26 and accompanying text.

4. Tort Claims Involving Deceit in Negotiations

In theory, a broad interpretation of an attorney deceit statute might produce at least two significant changes in the tort law involving attorneys accused of deceit during the negotiation process. First and foremost, it might deprive defendants of the argument that the plaintiff's reliance on a misrepresentation was not justified.[280] Because *Amalfitano* makes clear that section 487 does not codify a common law fraud action, a plaintiff should no longer have to establish that his or her reliance on the defendant-attorney's misrepresentations was justified.

Indeed, in light of the fact that *Amalfitano* recognized the validity of a statutory deceit claim based on an attempted but unsuccessful deceit,[281] the plaintiff's reliance on the defendant-attorney's misrepresentation to the plaintiff should not even be required.[282] At some point, of course, the falsity of an assertion may be so patently obvious as to deprive the statement of its fraudulent quality.[283] Regardless, an expansive reading of the statutory language as required by *Amalfitano*[284] would seem to limit the ability of a lawyer to assert in response to a charge of deceit during negotiations that the other side was represented by counsel and foolish for having believed what the lawyer said.

Second, an expansive reading of the statutory language might also make it easier for plaintiffs to establish the deceptive quality of the defendant's conduct, particularly in cases involving the omission or nondisclosure of facts. As discussed, courts have been reluctant to impose an ethical or tort duty on lawyers to disclose facts to an adversarial party during the negotiation process.[285] This is particularly true where the information that was not disclosed was discoverable, but the opposing party failed to ask for the information.[286] However, if

[280] *See supra* notes 162-64 and accompanying text (discussing this issue).

[281] *See supra* notes 235, 238-41, 245 and accompanying text (discussing court's resolution of certified question from federal court regarding whether successful lawsuit may be based on attempted but unsuccessful deceit).

[282] However, because a plaintiff still must establish that the deceit caused the plaintiff damages, the number of instances in which a plaintiff does not rely on a misrepresentation aimed at the plaintiff, but still suffers damages would seem to be fairly small.

[283] "The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." RESTATEMENT (SECOND) OF TORTS § 541 (1977).

[284] Amalfitano v. Rosenberg, 903 N.E.2d 265, 268 (N.Y. 2009).

[285] *See supra* note 66, 155-63 and accompanying text.

[286] *See* Brown v. Cnty. of Genesee, 872 F.2d 169, 175 (6th Cir. 1989) (concluding

one is supposed to take an expansive view of the statutory language in an attorney deceit statute, it becomes much easier to view the nondisclosure of a fact basic to the transaction as an act of deceit, even where no external law requires the disclosure of the fact.

These changes, coupled with the prospect of trebled damages, could dramatically reshape the nature of negotiations between lawyers. A lawyer's ethical obligation of confidentiality would still prevent the disclosure of many facts that might be relevant to a negotiation. However, an expansive reading of the statutory language contained in attorney deceit statutes would force courts to consider more carefully the question of whether nondisclosure amounts to deceit. Thus, the negotiation process could, in theory, look dramatically different if courts follow *Amalfitano*'s reasoning to its logical conclusion.

B. Amalfitano *as Anomaly: Why Courts Are Unlikely to Follow* Amalfitano *(At Least Not to Its Logical Extreme)*

You say you want a revolution?

— The Beatles, *Revolution*

Of course, the fact that courts could and arguably should — as a matter of principles of statutory construction — adopt *Amalfitano*'s reading of section 487 does not mean that they are likely to do so. Nor does it mean that following *Amalfitano*'s reasoning to its logical conclusions is necessarily desirable. Instead, for a number of reasons, it seems more likely that courts will either cling to their past restrictive interpretations of their jurisdiction's own attorney deceit statutes or adopt less expansive interpretations of the statutes when confronted with difficult cases.

1. Conflicts with the Legal Profession's View of Itself

Perhaps the most obvious reason why courts are unlikely to give full effect to the logic of *Amalfitano* is precisely because the decision is potentially so revolutionary. Following *Amalfitano*'s reasoning would require other courts to reverse their own well-established and far narrower constructions of their attorney deceit statutes. Beyond that, *Amalfitano*'s expansive interpretation directly challenges many of the legal profession's deeply held beliefs about itself that lawyers have used to justify the special protection afforded to them.

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that there was no unethical conduct by lawyer who failed to correct other side's misunderstanding); *supra* text accompanying note 71.

Take, for instance, the absolute litigator's privilege. Following *Amalfitano* to its logical extreme would likely mean that the privilege would lose its teeth.[287] But doing that kind of harm to the litigator's privilege would also entail an implicit rejection of the privilege's underlying justification: the supremacy of the goal of preserving the ability of lawyers to advocate zealously on behalf of their clients.[288] While perhaps not an absolute value in the practice of law, zealous advocacy holds considerable sway in the collective psyche of the legal profession.[289] It is a value lawyers assert not just in the litigation context but in the discovery and negotiation contexts.[290] Therefore, many judges would likely view any encroachment on this value — however well intentioned — with suspicion.

An expansive interpretation of the language in attorney deceit statutes is also somewhat in tension with one of the other primary justifications courts have used to limit the reach of tort law in connection with legal proceedings: the idea that litigation and negotiations are adversarial processes.[291] A certain amount of deceit is actually expected in the litigation process. As Professor Bruce Green has observed, "The professional lore glorifies criminal defense lawyers who engage successfully in trickery of various sorts."[292] Many lawyers see nothing wrong with a lawyer tricking a witness into believing that the lawyer has documentary evidence in his possession that demonstrates the witness is lying when, in fact, the lawyer has no such evidence. While the legal profession as a whole may view such tactics as good lawyering, they unquestionably involve deceit.

A certain amount of deception is also considered acceptable in the negotiation context.[293] Negotiation is frequently compared to poker,[294]

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[287] *See supra* notes 268-69 and accompanying text.

[288] *See supra* note 98 and accompanying text (noting privilege has been justified on grounds that it is necessary so as to provide attorneys with "the utmost freedom in their efforts to secure justice for their clients").

[289] *See* Allen K. Harris, *The Professionalism Crisis — The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 568-70 (2002) (noting lawyers' continued reliance on idea of zealous representation).

[290] *See generally* Wendel, *supra* note 38, at 929 (noting lawyers' objections to discovery process on grounds that process conflicts with idea of zealous representation).

[291] *See supra* note 93 and accompanying text.

[292] Green, *supra* note 16, at 367-68.

[293] McDermott, *supra* note 58, at 1018.

[294] *See, e.g.*, Joseph L. Morrel, Note, *Go Shops: A Ticket to Ride Past a Target Board's Revlon Duties?*, 86 TEX. L. REV. 1123, 1147 n.185 (2010) (analogizing negotiations to "a round of Texas hold 'em poker").

which involves a fair amount of bluffing, i.e., misleading one's opponent. And an ABA ethics opinion opines that lying about one's negotiation goals or willingness to settle is ethically permissible.[295]

Thus, while deceit is already technically prohibited by the disciplinary rules,[296] the reality is that at least some forms of deceit are considered perfectly acceptable in the practice of law. An expansive interpretation of the word "deceit" in an attorney deceit statute is potentially in tension with that reality. As such, many judges might be hesitant to adopt the *Amalfitano* approach.

2. Creating Tension in Existing Tort Law

There is also the practical concern about how a court adopting *Amalfitano*'s expansive interpretation of an attorney deceit statute would reconcile that approach with existing tort theories. For example, would the absolute litigation privilege for defamation — one of the oldest and most venerable of tort privileges — survive in the case of statutory deceit claim premised upon a false and defamatory pleading? Would the privilege still apply to statutory claims that would ordinarily sound under a different tort theory (such as misrepresentation or abuse of process) in jurisdictions that have extended the privilege to those other theories?

An expansive interpretation of the language in attorney deceit statutes would also expose lawyers to liability that their clients might not face. For example, the elements of the malicious prosecution tort are designed, in the words of one court, "to strike a balance between allowing free access to the courts for the vindication of rights without fear of a resulting suit, and the undue exercise of such right."[297] In a jurisdiction that requires the existence of a special injury before a malicious prosecution claim can proceed, an attorney who brings a claim without probable cause could face liability under section 487 for the increased legal costs associated with defending the claim.[298] The lawyer's client would not. Thus, by potentially exposing lawyers to liability in such cases, an expansive interpretation of an attorney deceit statute might have the same chilling effect on the ability of a client to vindicate his or her rights as eliminating or loosening some of the elements of the malicious prosecution tort would.

[295] ABA Comm. on Ethics, Formal Op. 06-439 (2006).

[296] *See supra* note 22 and accompanying text.

[297] Ammerman v. Newman, 384 A.2d 637, 641 (D.C. 1978); *see also* Long, *supra* note 99, at 489.

[298] *See supra* notes 264-65 and accompanying text.

An expansive interpretation of the statutes opens up a host of difficult legal questions. Courts have generally expressed skepticism at the idea that the cure for abusive litigation conduct is more litigation.[299] This would seem to be a particular concern where the recognition of new theories of liability would create conflicts with existing and well established theories of liability. In light of the potential for the type of doctrinal overload[300] that might result, it is difficult to see many courts following *Amalfitano*'s expansive approach to its logical conclusions.[301]

3. Problems of Overdeterrence and Overcriminalization

There is valid concern that an overly expansive interpretation of existing attorney deceit statutes could sometimes put attorneys in an untenable position and deter conduct that the legal profession rightly considers important. While no lawyer could rightly condone making a false statement of material fact to an opposing party with the intent to induce reliance, it is not at all out of the question that the term "deceit" might also include failing to correct the other side's misapprehensions about a material fact.[302] Yet, not only do many in the legal profession view remaining silent and taking advantage of an opponent's mistakes to be part of good lawyering, a lawyer's duties of

[299] *See, e.g., supra* note 148 and accompanying text (describing court's analysis of costs and benefits of adopting independent spoliation claim). *See generally* Joy, *supra* note 27, at 807 (noting general unwillingness of disciplinary authorities to control litigation conduct and stating that "the legal profession has determined that trial judges are more effective in controlling litigation conduct in pending matters").

[300] *See* Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 1006 (1994) ("The doctrinal overload — the endless note cases obsessively adding one little twist after another — represses debate.").

[301] In addition, one should not overlook some of the more subtle factors that might influence judges to reject *Amalfitano*'s broad interpretation. Judges are also former lawyers who often cannot help but think of themselves as such. Hence, some judges might recoil at the prospect of criminal prosecution and treble damages resulting from the zealous representation of a client. *See* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 460 (2008) (suggesting that judges' experiences as former practicing lawyers shape their sympathies). Finally, in states with elective judiciaries, judges might understandably be reluctant to interpret an attorney deceit statute in a manner that potentially exposes the most likely source of campaign contributions — attorneys — to criminal prosecution and/or treble damages. *See id.* at 458 (noting extent to which judges are dependent on lawyers for their positions).

[302] *See generally* Humbach, *supra* note 25, at 993-94 (stating that "truly honest lawyers" would "never purposely fail to disclose facts necessary to correct misapprehensions known to have arisen in the matter").

confidentiality and diligent representation might arguably require that silence.[303] Lawyers already must tread carefully in these situations, but an expansive interpretation of an attorney deceit statute increases the likelihood of civil liability while also potentially exposing a lawyer to treble damages in ethical gray areas. These concerns become more acute when one pauses to remember that attorney deceit statutes are penal in nature in the majority of jurisdictions.[304] Furthermore, the fact that attorney deceit statutes are, in some jurisdictions, criminal in nature should not be overlooked. Admittedly, criminal prosecution under the statutes does not appear to have been a significant possibility as a historical matter given the lack of reported decisions involving prosecution.[305] That said, there have been at least some prosecutions under these statutes.[306] Moreover, a rejuvenated deceit statute might lead to new prosecutions.[307] And the mere possibility of a criminal conviction may be more threatening than the possibility of a lawsuit. Bruce Green has argued that even where there is no serious risk of criminal prosecution, lawyers may alter their conduct in an attempt to comply with the penal statute to avoid any anxiety, cost, civil liability, and damage to reputation that might come from an accusation or prosecution.[308] This is a concern for lawyers who engage in highly aggressive lawyering, but lawyering that is nonetheless noncriminal in nature. It is also a concern for lawyers who are forced to deal with difficult ethical questions and who behave "in accordance with a plausible understanding of the professional norms" of the legal profession.[309]

Finally, although existing attorney deceit statutes contain significant ambiguity in terms of scope, they limit the discretion of judges in other ways. Unlike tort law, where courts retain some discretion as to whether a defendant's conduct is egregiousness enough to submit the question of punitive damages to the jury, most attorney deceit statutes make the trebling of damages mandatory. Thus, courts must treat

[303] *Id.* at 995, 1012-13.

[304] *See supra* note 193 and accompanying text.

[305] *See supra* note 215 and accompanying text.

[306] *See supra* note 215 and accompanying text.

[307] Bruce Green has argued that "because the criminal process may be more effective than either the disciplinary or the civil process, lawyers who engage in misconduct proscribed by the criminal law may face a more substantial risk of discovery and punishment." Green, *supra* note 16, at 332.

[308] *Id.* at 345-46.

[309] *Id.* at 328.

every instance of actionable deceit in the same manner, regardless of the circumstances.[310]

Many of these concerns exist with respect to most criminal statutes that apply to lawyer conduct. However, they are particularly acute in the case of broadly worded statutory language present in existing attorney deceit statutes. Ultimately, the risk is that such statutes may deter not only conduct that the legal profession and the public abhor, but conduct that may be essential to effective representation of clients.

C. Amalfitano *as a Harbinger of Legislative Scrutiny of and Judicial Intolerance of Attorney Deceit*

The concerns over adopting an expansive interpretation of existing attorney deceit statutes are relatively easy to identify. Therefore, it seems safe to conclude that the New York Court of Appeals foresaw most if not all of these concerns. Why then did it choose — in a unanimous opinion no less — to interpret the statute in the manner it did?

One possible explanation is that there was only one plausible interpretation of New York Judiciary Law section 487. Thus, the court had no choice but to adopt its expansive interpretation. However, to suggest that there is but one clear meaning to broadly worded statutory language with roots dating back over 700 years seems almost farcical.[311] Another possible explanation is that the court's interpretation was influenced by a desire to remain true to the original understanding of the statutory language. However, aside from the single reference to the *Looff* decision from a lower court in New York in the nineteenth century, there is no attempt to square the court's interpretation of the term "deceit" with the historical understanding of that term. The court did trace the language of section 487 to the First Statute of Westminster, but there was no attempt to determine how British courts had interpreted the statutory language prior to its adoption in New York.

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[310] *See generally* Wiggin v. Gordon, 455 N.Y.S.2d 205, 209 (N.Y. Civ. Ct. 1982) (concluding "reluctantly" that court was "without any alternative but to apply treble damages" in case of attorney deceit under statute).

[311] *See generally* Rose, *supra* note 169, at 58 ("Although a modern interpretative approach would focus on the normal meaning of the statutory language and the legislative history, the earlier discussion of medieval interpretation demonstrated that such an approach to exploring chapter 29's meaning would be inappropriate because of the use of considerable judicial discretion and the diminished significance of language.").

The most logical explanation is that, confronted with statutory language capable of multiple interpretations, the New York Court of Appeals was influenced by a concern about deceptive behavior in the practice of law and the inability of existing measures to address such behavior adequately. The perception remains among the public and wide segments of the legal profession that deceptive and dishonest behavior in the course of representing a client remains a problem.[312] Regardless of whether the actual number of instances of attorney deceit has remained relatively constant since the First Statute of Westminster or whether they have increased as competition for clients among lawyers has become more intense, there is a strong sense that a "win-at-all-costs" mentality increasingly pervades the practice of law.

Members of the court could hardly be unaware of these concerns. Moreover, as appellate judges and — in at least some cases — former trial court judges, the justices of the New York Court of Appeals have hands-on experience with the problem of "Rambo-litigation tactics" and various forms of deceptive behavior. Indeed, as members of the state's highest court, the justices of the New York Court of Appeals retain ultimate authority over the practice of law in the state and routinely review appeals from the disciplinary process in the state. Thus, they have their own opinions as to the prevalence of deceptive behavior in the practice of law and the success or failure of existing measures to address this behavior.

Perhaps then *Amalfitano* is a reflection of the court's view that attorney deceit remains an intractable problem that requires new solutions. In this instance, the "new" solution was to breathe life into a centuries-old prohibition. In an 1897 decision, the Special Term of the New York Supreme Court suggested that New York's attorney deceit statute was enacted because "[o]ftentimes the court was powerless to protect itself" from fraud, and "there was no punishment" for an attorney who deceived a court "by sharp practice, false statement, or in withholding some fact from the court which he was in good faith bound to disclose."[313] Subsequent to that decision, new methods of dealing with these forms of deceit were devised, including increased judicial sanctions and the system of professional discipline. Perhaps not coincidentally, New York decisions from the latter half of the twentieth century reflected a much different view of the statute: up until the *Amalfitano* decision, New York courts routinely referenced the limited scope of the statute's reach.[314]

[312] *See supra* notes 1, 39 and accompanying text.

[313] People v. Oishei, 45 N.Y.S. 49, 52 (N.Y. Sup. Ct. 1897).

[314] *See supra* note 220 and accompanying text.

What then accounts for the New York Court of Appeals's radical return in *Amalfitano* to the nineteenth-century understanding of the statute? Perhaps it has at least something to do with the court's belief that judicial sanctions and professional discipline have failed fully to address the problems referenced by the Special Term of the New York Supreme Court back in 1897. Admittedly, there is little in the opinion that speaks directly to the court's views as to the prevalence of deceit in the practice of law or the ability of existing measures to address attorney deceit adequately. The opinion is relatively short and focuses almost exclusively on the history of the statutory language found in New York Judiciary Law section 487. However, the court repeatedly referenced the special obligations attorneys have by virtue of their positions.[315] In light of the obvious and difficult host of future issues the decision raises and the fact that there were other, more restrictive yet equally plausible interpretations of this language available to the court that would have avoided these issues altogether, one must seek an explanation somewhere. Ultimately, the most logical explanation is that the court's perceptions regarding deceit in the practice of law heavily influenced the *Amalfitano* decision.

If this is the case, the decision is potentially something of a warning sign for the legal profession. Over the past two decades, courts have considered whether to expand tort liability related to the legal process by recognizing the torts of malicious defense and spoliation of evidence. Although most state courts have declined to recognize these torts, a few have been willing to do so.[316] And there is at least some feeling that courts have begun to impose tougher sanctions on offending lawyers.[317] Thus, there is at least some evidence from which to conclude that the courts are becoming less tolerant of deception in the administration of justice and more accepting of the idea that the traditional approaches to such deception have proven inadequate. Therefore, it is significant that the highest court in New York — the state with the highest number of lawyers in the nation and the state that contains the city with the highest number of lawyers in the nation[318] — would interpret a statute specifically targeting lawyers in a

[315] *See* Amalfitano v. Rosenberg, 903 N.E.2d 265, 269 (N.Y. 2009).

[316] *See supra* notes 123-33, 146-53 and accompanying text.

[317] *See generally* Moss, *supra* note 83, at 560 (stating recent trend of courts to more willingly impose sanctions).

[318] *See* Thomas Adcock, *Addition of Three Law Schools to New York's 15 Stirs Debate*, 239 N.Y. L.J. 1,1 (2008); George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1649 (2006).

manner so contrary to the judiciary's traditional favoritism toward lawyers and in a manner that could dramatically expand lawyers' liability. If the New York Court of Appeals feels the problem of attorney deceit is significant enough to warrant the kind of strong medicine *Amalfitano* seems to prescribe, perhaps this is a sign that a growing segment of the judiciary — long the protector of the legal profession's interests[319] — is losing patience with the lack of professionalism among lawyers.[320]

If the judiciary is in fact losing some of its zeal to shield lawyers from liability, the loss is potentially significant for the legal profession. *Amalfitano* comes at a time when federal agencies are increasingly establishing their own, sometimes more stringent regulations on attorney conduct;[321] prosecutors are demonstrating less respect for the attorney-client privilege than they have in the past in pursuing prosecutions;[322] and state legislatures have adopted more stringent restrictions on specific forms of attorney conduct, such as the solicitation of clients and the filing of Strategic Lawsuit Against Public Participation ("SLAPP") suits,[323] than the legal profession itself has.[324]

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[319] Barton, *supra* note 301, at 454-55 (stating that "if there is a clear advantage or disadvantage to the legal profession in any given question of law . . . judges will choose the route (within the bounds of precedent and seemliness) that benefits the profession as a whole").

[320] *See generally* Qualcomm, Inc. v. Broadcom Corp., No. 05CV1958-B, 2008 WL 66932, at *20 (S.D. Cal. Jan. 7, 2008) (opining that there has been "a decline in and deterioration of civility, professionalism and ethical conduct in the litigation arena"); Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 3 (1993) ("[T]he standing of the legal profession is at its lowest ebb in the history of our country due to the misconduct of . . . all too many lawyers in and out of the courtroom.").

[321] *See* Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670-71,707 (proposed Nov. 21, 2002) (to be codified at 17 C.F.R. pt. 205).

[322] *See* John S. Baker, Jr., *Reforming Corporations Through the Threat of Criminal Prosecution*, 89 CORNELL L. REV. 310, 329 (2004) (noting that American Counsel Association has complained that "[i]t is the regular practice of U.S. Attorneys to require corporations to waive their attorney-client privileges and divulge confidential conversations and documents in order to prove cooperation with prosecutor's investigation").

[323] As described by one practitioner:

> The typical SLAPP lawsuit involves citizens opposed to a particular real estate development. The group opposed to the development, usually a local neighborhood, protests by distributing flyers, gathering protest petitions, writing letters to local newspapers and speaking at planning commission and city council meetings. The developer responds by filing a SLAPP lawsuit against one or more of the citizens, alleging defamation or various business torts. . . .
>
> A SLAPP lawsuit is "filed solely for delay and distraction, and to punish

In short, *Amalfitano* comes at a time when the traditional deference shown to the judgment of the judiciary and the legal profession concerning the rules governing the profession is on a steady decline. In addition, the decision comes at a time when there are fewer lawyers in state legislatures to look out for the legal profession's interests,[325] and politicians are increasingly scoring points by questioning the integrity of lawyers and judges.

Add to all of the above the reality that there is a strong sense among many nonlawyers that dishonesty is prevalent in the practice of law, and one can easily foresee increased external regulation of the legal profession. Over twenty years ago, the ABA Report of the Commission on Professionalism warned that unless the legal profession was willing to institute its own reforms, "far more extensive and perhaps less-considered proposals may arise from governmental and quasi-governmental entities attempting to regulate the profession."[326] This warning seems even more prophetic today.[327] The attorney deceit statutes in existence in various states today contain broad language that cover a variety of forms of lawyer misconduct and raise a host of

> activists by imposing litigation costs on them for exercising their constitutional right to speak and [to] petition government." The primary purpose of a SLAPP lawsuit is not to resolve the allegation in the petition, but to punish or retaliate against citizens who have spoken out against the plaintiffs in the political arena and to intimidate those who would otherwise speak in the future. A SLAPP lawsuit is often intended to make the victim an example and a carrier who spreads the virus of fear throughout the community.

Stephen L. Kling, *Missouri's New Anti-SLAPP Law*, 61 J. MO. B. 124, 124 (2005). Numerous states have adopted anti-SLAPP laws, which, among other things, shifts "fees and costs to the filer when the target prevails on the motion." *Id.* at 125.

[324] *See* Bergman v. District of Columbia, No. 08-CV-859, 2010 WL 114015, at *17 (D.C. Jan. 14, 2010) (upholding constitutionality of statute that D.C. law prohibits lawyers and other professionals from soliciting clients within twenty-one days of car accident, except by mail); Kling, *supra* note 323, at 125 ("The message to judges and lawyers by state legislatures that adopt [anti-SLAPP] laws is that the era of intimidation of the public by SLAPP lawsuits is over.").

[325] *See* Harris, *supra* note 289, at 589 (suggesting that there will be fewer lawyers serving in positions of prominence in state legislatures in future); Kevin Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Lawyers*, 57 RUTGERS L. REV. 839, 842 n.6 (2005) (citing statistics demonstrating decline in number of lawyers in state legislatures and in Congress).

[326] ABA Comm'n on Professionalism, ". . .In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 248 (1986).

[327] *See generally* Harris, *supra* note 289, at 589 (stating that warning of ABA Commission on Professionalism "clearly carries more urgency today than it did in 1986").

complicated ethical issues for lawyers. If increased state regulation of the practice of law is forthcoming, it might very well resemble the language found in these statutes.

D. Amalfitano *as Model for Reform*

The dangers associated with an expansive interpretation of existing attorney deceit statutes ultimately limit the utility of the statutes in addressing deceit in the practice of law. However, perhaps the principles underlying the statutes and *Amalfitano*'s broad reading of New York Judiciary Law section 487 may help shape a reevaluation of the courts' traditional aversion to lawyer liability. The following subsection argues that, in narrow instances, expanded civil liability for attorney fraud committed upon a court is appropriate.

1. The Advantages of Tort Law

Patel v. OMH Medical Center, Inc. is an Oklahoma case involving an allegation that a lawyer made misrepresentations to the court at trial concerning documentary evidence.[328] The decision is noteworthy if only for the following heading, which appears toward the end of the court's opinion: "NO CIVIL REMEDY IS AVAILABLE FOR LITIGATION-RELATED MISCONDUCT."[329] Read literally, the heading is quite striking. Presumably, by "no civil remedy," the court meant to exclude the possibility of any form of civil liability, including battery or assault. Ultimately, the heading is noteworthy as an expression of a rather extreme form of the judicial reluctance to allow tort law to address lawyer misconduct in a pending proceeding.

Existing attorney deceit statutes — at least as interpreted by the New York Court of Appeals — may be too blunt an instrument to address the problem of deceit in the practice of law. Furthermore, given some of the potential problems associated with trying to define when, in Green's words, " 'bad lawyering' end[s] and 'criminal lawyering' begin[s],"[330] criminal law should not be the primary vehicle to address deceit in the practice of law. However, perhaps the *Amalfitano* decision presents courts and commentators with the opportunity to reflect on statements like those in *Patel* and question whether such hyper-skepticism regarding the possibility of liability resulting from dishonesty in the course of a legal proceeding is truly

[328] Patel v. OMH Med. Ctr., Inc., 987 P.2d 1185, 1203 (Okla. 1999).

[329] *Id.* at 1201.

[330] Green, *supra* note 16, at 328.

justified. Perhaps, in light of the public skepticism regarding attorneys, the frustration among many lawyers and judges concerning the dishonest practice of law, and the increased potential for external regulation of the sort represented by existing attorney deceit statutes, there is room for relaxation of the traditional reluctance to civil liability.

In commenting on its own attorney deceit statute, the Montana Supreme Court noted the dual purpose of the statute: "To compensate the innocent party who incurred additional time and expense as a result of the deceit of the culpable attorney [and] . . . to punish . . . any attorney who deceives the court or the other party."[331] Compensation and deterrence are also the two most commonly cited justifications for civil liability.[332] Of course, there are other means that courts and the legal profession could employ to accomplish these goals. Although it may sound trite at this point, the legal profession can and should continue to emphasize that the concept of zealous representation has its limits. The organized bar should continue its efforts to reconceptualize "zealous representation" as "diligent representation" and promote the idea of tough, but honest lawyering. For their part, courts can further the goals of compensation and deterrence by more frequently imposing monetary sanctions when dealing with attorney deceit. In addition to compensating victims, monetary sanctions are likely to have a greater deterrent effect on dishonest behavior than are other types of sanctions.[333]

Although these kinds of measures may be desirable, they would function especially well in tandem with expanded tort liability. First, sanctions may not always adequately compensate a victim for the full

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[331] LaFountaine v. State Farm Mut. Auto. Ins. Co., 698 P.2d 410, 413 (Mont. 1985).

[332] *See* DAN B. DOBBS, THE LAW OF TORTS §§ 11–12, at 19-22 (2000).

[333] *See* Bourne, *supra* note 146, at 641-42 (concluding that nonmonetary sanctions "are totally inadequate for deterring" spoliation of evidence); Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 878 (1991) ("[M]onetary sanctions may be better responses to suppression in many cases, which in turn argues in favor of the extension of such forms of response, by endorsing both compensatory and deterrent monetary discovery sanctions and, where these are nonetheless inapplicable or inadequate, the spoliation tort."); *see also* Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 79 (2008) ("[P]otential civil liability often deters lawyer misconduct more effectively than does the threat of professional discipline."). *See generally* FOREWORD TO RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, at XXI (2000) ("[T]he Restatement recognizes what everyone involved with the ethics codes knows . . . namely that the remedy of malpractice liability and the remedy of disqualification are practically of greater importance in most law practice than is the risk of disciplinary proceedings.").

range of harm incurred as a result of attorney deceit. For example, vacating a judgment under Rule 60 in the case of fraud upon the court would still only provide a remedy for a victim who actually lost a lawsuit or similarly obtained a worse result than he or she otherwise would but for the fraud. Vacating a judgment would do nothing to compensate those who ultimately prevailed on a claim or defense, but had to incur the additional time, expense, or other special injuries caused by the fraud. Nor would it compensate those who incurred similar damages stemming from an attempted but unsuccessful fraud upon a court.

Second, a court that announces a new theory of tort liability for lawyers is making a statement in a manner that increased reliance on judicial sanctions cannot. Like criminal law, tort law establishes boundaries of permissible conduct.[334] As others have noted, tort law, with its ability to compensate and punish, "serve[s] a strong educative function for both the individual offender and society in general."[335] Professor David G. Owen has suggested that by establishing the possibility of punitive damages through recognition of a tort theory, courts "proclaim the *importance* that the law attaches to the plaintiff's particular invaded right, and the corresponding *condemnation* that society attaches to its flagrant invasion by the kind of conduct engaged in by the defendant."[336]

A court's recognition of a tort theory that specifically addresses lawyer misconduct carries with it particular symbolic force. By articulating the contours of liability, a state's highest court — the entity ultimately responsible for the regulation of the practice of law in the state — is making a statement about the norms of the legal profession. And because the practice of law is so closely intertwined with the administration of justice, the articulation of a tort rule governing lawyer deceit is also an expression of societal norms.[337]

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[334] *See* Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 771 (2008).

[335] David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374 (1994); *see* Koenig, *supra* note 334, at 772 (noting that some torts teach "the general population about society's norms and the penalties for violating its rules of proper behavior").

[336] Owen, *supra* note 335, at 374; *see also* Cass R. Sunstein et al., *Assessing Punitive Damages*, 107 YALE L.J. 2071, 2075 (1998) (noting that punitive damages "may reflect the 'sense of the community' about the egregious character of the defendants' actions").

[337] *See generally* Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 418 & n.65 (1995) (noting "moral character" of tort action of deceit or fraud); Eric T. Freyfogle, *Water Justice*, 1986 U. ILL. L. REV.

Therefore, the recognition of a new tort theory of liability is expressive of the legal profession's disapproval of attorney deceit in a way that increased judicial sanctions for such misconduct is not.

Existing attorney deceit statutes convey in a concise manner the exact message the legal profession should be communicating to its members and to the public at large. Although the utility of the statues is undermined by the broadness of the language, the symbolism of the statutes is important. By relying on the development of tort law to address the same subject matter, courts can achieve the same educational and symbolic goals while dealing with attorney deceit on a more practical basis.

2. Recognizing Limited Liability for Fraud upon a Court

Courts can achieve the symbolic and practical goals of attorney deceit statutes while balancing some of the legitimate concerns of the legal profession regarding diligent representation by limiting new theories of lawyer liability to especially egregious instances of misconduct. Although courts have, in at least some instances, been willing to recognize tort claims premised upon the deception of an opposing party, they have been far less willing to recognize liability where the conduct — either independently or as part of a fraud upon a party — involves fraud or attempted fraud upon a court. However, if there is one area in which the restrictions on civil liability against lawyers should be loosened, it is in the case of fraud or attempted fraud upon a court. Here, perhaps, the authors of the Statute of Westminster in 1275 were on to something.

Deceit by one party against another during a legal process is bad. It may cause the other party to incur increased time and expense in dealing with the deceit,[338] added anxiety and emotional distress,[339] and potentially the loss of the opportunity to prevail in a lawsuit or achieve a better outcome.[340] A fraud upon the court is worse in that it

481, 503 (1986) ("Tort law has long had close ties to community values and standards and to shifting concepts of public morality."); Koenig, *supra* note 334, at 773 (discussing ability of tort law to educate others with respect to cultural norms); John C.P. Goldberg, Note, *Community and the Common Law Judge: Restructuring Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1334 (1990) ("When norms of obligation are incorporated into the common law they gain a special status.").

[338] *See supra* note 331 and accompanying text.

[339] *See supra* note 130 and accompanying text.

[340] *See, e.g.*, Smith v. Sup. Ct., 198 Cal. Rptr. 829, 837 (Ct. App. 1984) ("[A] prospective civil action in a product liability case is a valuable 'probable expectancy' that the court must protect from [intentional spoliation of evidence]."); *see also* Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving*

is a wrong not just against an opposing party, but, in the words of the Supreme Court, "is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."[341] Deceit involving a fraud upon the court damages the integrity of the judicial process.[342]

A *lawyer's* fraud upon the court is worse still. The deception is worse because it originates from an individual who has special obligations to the court and society more generally with respect to the administration of justice.[343] And it is worse because it originates from one whom the court and the legal profession — through the process of admission to the bar — have actually put in a position to perpetrate the fraud. The legal profession has established a monopoly on the practice of law, the entry to which is controlled exclusively by the courts and state bars. Thus, not only is an attempted fraud upon a court more damaging to the integrity of the judicial process and the legal profession than other types of deceit, it is a fraud for which the courts and the legal profession have a special responsibility.

For example, the near-universal rule that there is no remedy for perjury by a party makes a certain amount of sense. In addition to the justifications for the rule courts frequently offer,[344] there is also the reality that the legal process fully anticipates that the parties themselves will lie or engage in other forms of deceit. A party's deceit in the legal process is entirely foreseeable by the other party. It is a risk that the parties to some extent assume when they enter the legal system. This is why we trust juries to sort out who is telling the truth and lawyers to aid in this process. But a party to a civil proceeding should not be expected to bear the risk that a lawyer — an officer of the court — will be a willing participant in the attempted fraud upon the court or jury. Various ethics rules enlist lawyers in the attempt to

Preexisting Conditions and Future Consequences, 90 YALE L.J. 1353, 1354 (1981) (arguing in favor of recognizing recovery when physician's negligent treatment of pre-existing condition reduces chance of recovery); Nesbitt, *supra* note 83, at 577-78 (arguing in favor of similar loss of opportunity theory in case of spoliation of evidence).

[341] Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246 (1944).

[342] *Id.*

[343] *See* Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972) (stating that attorney's role as officer of court "demands integrity and honest dealing with the court"); MODEL RULES OF PROF'L CONDUCT, Pmbl. ¶ 8 (noting lawyer's responsibilities as "an officer of the legal system and a public citizen").

[344] *See supra* notes 139-42 and accompanying text.

make the legal process fair.[345] By holding itself open to the public as a vehicle for resolving legal disputes and by certifying that those who practice law are fit to serve as part of the administration of justice, the courts and the legal profession have made an implicit promise to participants in the process that, at a minimum, the lawyers involved in the process will act honestly. Although courts and the legal profession have sought to enforce that promise through the use of judicial sanctions and professional discipline, the parties who are affected by attorney deceit should, in some instances, be entitled to a remedy for the time, expense, distress, and intangible harms that flow from attorney deceit. And in order for participants in the legal process and the public to have faith in the assurance that lawyers will not be active participants in a fraud upon the court, there must be adequate deterrents to such conduct.

Tort law — developed in conjunction with sanctions and professional discipline — is an appropriate vehicle to accomplish these goals. Courts have been willing to recognize new tort theories where the defendant's conduct not only causes harm to an individual but also imperils an important public interest or process.[346] Thus, tort law is an appropriate vehicle to address the harmful effects on the administration of justice and the public's perception thereof resulting from an attorney's fraud upon the court.

Over time, courts can develop the contours of theories of civil liability related to attorney deceit committed upon a court during the legal process in a more nuanced manner than existing attorney deceit statutes, while still accomplishing the basic goals of compensation and deterrence. Of course, actual fraud upon a party could still be actionable under the traditional intentional misrepresentation or fraud tort. But for attorney actions such as knowingly presenting false evidence, making false representations to a court, and intentionally destroying evidence, tort law can work in conjunction with the

[345] *See supra* notes 25-57 and accompanying text.

[346] *See, e.g.*, Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1945 (1996) (stating "driving force behind the tort" of wrongful discharge in violation of public policy is search for third-party effects of employer's discharge of employee); *see also* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 cmt. a (Tentative Draft No. 2, 2009) (stating that "primary justification for this tort is that . . . certain discharges harm not only the specific employee but also third parties and society as a whole in ways contrary to established norms of public policy"); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 57 (1988) (noting "the long-standing policy of tort law to design liability rules so as to correct for market failure due to the existence of externalities or third party effects").

disciplinary process and judicial sanctions to provide remedies to injured parties and deter similar misconduct.

Recognizing new tort theories will obviously lead to increased litigation and lawyer liability. However, given the difficulty plaintiffs face in establishing that a defendant acted with the intent to deceive, the resulting increase in litigation and liability would likely not be substantial.[347] Moreover, an increased willingness on the part of courts to impose more meaningful sanctions would also seem likely to limit the number of new lawsuits.

There is also the concern that any new theories of liability might threaten some of the values the legal profession rightly holds. However, courts should be capable of addressing these concerns. For example, while recognizing the tort of malicious defense, the New Hampshire Supreme Court emphasized that "[m]alicious defense, like its counterpart malicious prosecution, is a limited cause of action that will lie only in discrete circumstances, and malicious defense claims will accordingly be scrutinized closely and construed narrowly."[348]

Courts can limit the scope of any new tort theories by confining them to situations in which a lawyer makes a factual representation to a court. A representation might result from an express statement of a fact or from the operation of a rule of procedure, such as Rule 11 certification. A representation might also impliedly result by virtue of a rule of professional responsibility. For example, by putting a witness on the stand and eliciting testimony, a lawyer is impliedly representing that he does not know that the witness's testimony is untruthful. Ultimately, however, any new theories of liability should be limited to situations in which existing tort theories are not designed to address the wrongdoing and for which the injured party has not already obtained an adequate remedy. Thus, for example, a party who is deceived during settlement negotiations would not be entitled to recovery under any new tort theory because the victim's claim, if any, would sound under a fraudulent misrepresentation theory.

CONCLUSION

Time will tell whether *Amalfitano* will be seen as a significant step in the steady drift toward external regulation of the legal profession, a

[347] *See generally* Haggerty v. Ciarelli & Dempsey, No. 09-2135-CV, 2010 WL 1170352, at *1 (2d Cir. Mar. 25, 2010) (noting reluctance of New York courts to assume intent to deceive on part of attorneys resulting from conduct "well within the bounds of the adversarial proceeding").

[348] Aranson v. Schroeder, 671 A.2d 1023, 1028 (N.H. 1995).

step in the legal profession's re-evaluation of expanded tort liability for lawyers, or merely a blip in the decisional law dealing with attorney deceit. Attorney deceit statutes of the kind at issue in *Amalfitano* ultimately represent an unwise approach to the problem of deceit in the practice of law. However, hopefully the decision will serve to illustrate to members of the legal profession what heightened statutory regulation of the legal profession might look like.

There are any number of steps the legal profession can and should take with respect to the problem of dishonest practice, ranging from continued efforts to promote true professionalism to improvement of the disciplinary process. But for its part, the judiciary should be willing to re-evaluate its traditional reluctance to permit civil liability against lawyers. And in keeping with the principles underlying a centuries-old statute addressing attorney deceit, they should start with instances of fraud upon the court.