THE ETHICS OF NEGOTIATIONS FOR ESTATE PLANNERS: ARE THERE ANY?

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By

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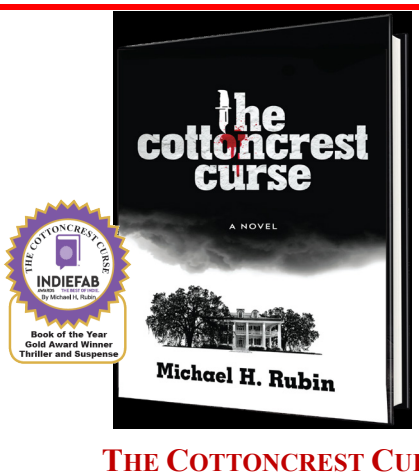
Rubin is an author of, co-author of, and contributing writer to more than a dozen legal books and over forty articles; his works are used in law schools and have been cited as authoritative by state and federal trial and appellate courts, including the U.S. First and Fifth Circuits. He has been honored as the Distinguished Alumnus by the LSU Law School and as the Distinguished Attorney of Louisiana by the Louisiana State Bar Foundation. His latest legal book, on Louisiana finance and real estate, is THE LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS (Carolina Academic Press), now in its second edition.

Rubin also is a novelist. At the American Library Association's annual meeting in San Francisco in 2015, his debut novel, a historical thriller entitled THE COTTONCREST CURSE, received the IndieFab Gold Award Winner as the best thriller/suspense novel published by a university or independent press. Publishers Weekly calls it a "gripping debut mystery," and 225 Magazine writes that it is "not just a thrilling murder mystery, but also a compelling look at life in south Louisiana during its most tumultuous decades." His second novel, a contemporary legal thriller entitled "CASHED OUT," now in its second edition, has won the Jack Eadon Literary Award as the Best Contemporary Drama. The Providence Journal says: "*Cashed Out* features "a lawyer down and out enough to make John Grisham proud. He's culled from the likes of Michael Connelly by way of James Lee Burke. A gem of a tale." Both of Rubin's novels are available in your local bookstores, on the websites of Amazon and Barnes & Noble, and as eBooks in both Kindle and Nook formats.



THE COTTONCREST CURSE

When they know who you really are,
you're never safe.

In this heart-racing thriller, a series of gruesome deaths ignite feuds that burn a path from the cotton fields to the courthouse steps, from the moss-draped bayous of Cajun country to the bordellos of 19th century New Orleans, from the Civil War era to the Civil Rights era and across the Jim Crow decades to the Freedom Marches of the 1960s and into the present.

At the heart of the story is the apparent suicide of an elderly Confederate Colonel who, two decades after the end of the Civil War, viciously slit the throat of his beautiful young wife however, believes that this may be a double homicide, and suspicion falls upon Jake Gold, an itinerant peddler who trades razor-sharp knives for fur and who has many deep secrets to conceal.

Jake must stay one step ahead of the law, as well as the racist Knights of the White Camellia, as he interacts with landed gentry, former slaves, crusty white field hands, crafty Cajuns, and free men of color all the while trying to keep one final promise before more lives are lost and he loses the opportunity to clear his name.

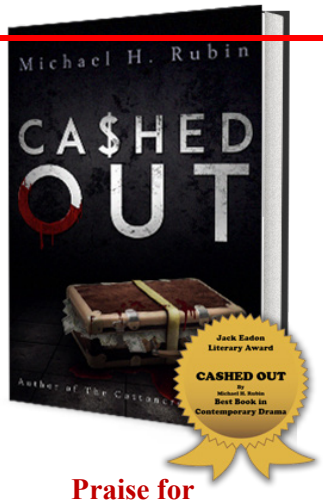
CASHED OUT

Holding $4 million in cash, given to you by your murdered client, makes you everyone's target.

One failed marriage. Two jobs lost. Three maxed out credit cards. "Schex" Schexnaydre was a failure as a lawyer. Until three weeks ago, he had no clients and no cash. Well, no clients except for infamous toxic waste entrepreneur G.G. Guidry, who's just been murdered. And no cash, except for the $4,452,737 Guidry had stashed with him for safekeeping.

When Schex's estranged ex-wife, Taylor, is accused of Guidry's murder, she pleads with Schex to defend her. He refuses, but the more he says no to Taylor, the deeper Schex gets dragged into the fall-out from Guidry's nefarious schemes, ending up as the target of all those vying to claim Guidry's millions for themselves.

Schex careens from the swamps and marshes of Louisiana's chemical corridor to the deep water oil rigs in the Gulf of Mexico, from the river industries that pollute minority neighborhoods to the privileged playgrounds of New Orleans' crime syndicate bosses, and from a notorious alligator processing plant to the halls of political power, all in an attempt to clear his name and claim Guidry's cash for himself.



Praise for "The Cottoncrest Curse"

"Rubin's **gripping debut mystery** depicts the bitter racial divides of post-Reconstruction South and its continuing legacy."
Publishers Weekly

"This historical thriller is thoroughly researched. It is literary fiction taking "readers on **an epic journey**."
Southern Literary Review

"The "**story is gripping, the writing is masterful**. Rubin has struck gold in his debut novel."
Chicago CBA Record

"Michael Rubin's debut novel, 'The Cottoncrest Curse,' introduces us to **a fresh new voice that weaves talented prose and tack-sharp detail into an intriguing story** set in Louisiana's bayou country."
Alan Jacobson,
USA Today national bestselling thriller author

"A **thrilling murder mystery**."
225 Magazine

Praise for "Cashed Out"

"*Cashed Out* features **a lawyer down and out enough to make John Grisham proud**. He's culled from the likes of **Michael Connelly by way of James Lee Burke**. A gem of a tale."
– Providence Journal

"Cash in on this **thrilling read**. Set in the sweltering heat of the Louisiana bayou, ***Cashed Out* is enthralling. Fast-paced plot. Page turning.**"
Foreword Reviews

If you like John Grisham and Michael Connelly's Lincoln Lawyer, you're gonna love "Schex" Schexnaydre – an attorney who breaks all the rules looking for some kind of justice. **Fast, funny, and filled with twists and edge-of-your-seat suspense.** Michael H. Rubin really nails it!
R.G. Belsky, author of the Gil Malloy mystery series

THE ETHICS OF NEGOTIATIONS: ARE THERE ANY?[2]

BY: MICHAEL H. RUBIN[3]

1. THE TUGS AND PULLS

All estate planners engage in negotiations, whether they are lawyers, bankers, CPAs, CFPs, CEPs, or otherwise. The client's desires and interests are not the only thing negotiators have to keep in mind.

With estate planning that involves interaction with third parties, as with any contract-based discussions, the goal is to get to a conclusion that satisfies the client in a way that is not disadvantageous to the client. This often involves concealing from the other side the client's bottom line. Doing this often involves puffing, bluffing, or merely letting the other side proceed under a misapprehension that aids the client's goals.

What are the parameters that might guide estate planners in negotiations? Lawyers who do estate planning must comply with the Rules of Professional Responsibility[4] as well be aware of codes of professionalism, and there are a plethora of

[2] Portions of this paper consist of excerpts from and adaptations of the author's prior publications, including:

"The Ethics of Negotiations for Estate Planners," National Association of Estate Planners and Councils, Las Vegas, NV (November 2019); "The Ethics of Negotiations for Bank Counsel," Louisiana Bank Counsel Conference, New Orleans, Louisiana (December 2018); "The Ethics of Negotiations for Florida Attorneys and Loan Offices," Florida Bar Real Property Probate and Trust Law Section Annual Attorney/Loan Officer Conference (Orlando, October 2018); "The Ethics Of Negotiations For Washington State Lawyers: Are There Any?, Washington State Bar Association's Real Property Probate and Trust Section Annual Meeting, Elum, Washington (June 2018); "Ethical Negotiations in Las Vegas," Nevada Bar Real Estate Section (Las Vegas, November, 2017); "The Ethics of Negotiations," International Conference of Shopping Centers, (San Antonio, September, 2017); "High Level Negotiations: Are There Any Limits," ABA Real Property Trusts and Estates Spring Symposia (Denver, April 2017); "The Ethics of Negotiations for Artists and Authors," Arts and the Media Inaugural Program (Baton Rouge, 2016); "The Ethics of Negotiations for Tax Practitioners" ABA Tax Section (New Orleans, 2013); "The Ethics of Negotiations for Washington Estate and Tax Planners," (Seattle, WA, Dec. 2012); "The Ethics of Texas Negotiations," Dallas Bar Association Energy Law Section, August 17, 2012; "The Ethics of Oil and Gas Negotiations," Center for American and International Law, Institute for Energy Law 63rd Annual Institute, February 16, 2012 (Houston, Texas); "The Ethical Utah Lawyer: What Are The Limits In Negotiation?," 21 Utah Bar Journal 15 (March/April, 2008); "The Intersection of Conflicts of Interest and Imputation of Knowledge," 22 ABA Probate and Property 53 (Nov. 08); "Ethics," The Construction Lawyer, Fall 2006; and "Labor Negotiations: Do Any Rules of Ethics or Professionalism Really Apply?" ALI-ABA Labor Seminar, Spring 2003, "The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties," 26 The Construction Lawyer 12 (2006); "Breaching the Protective Privity Wall: Expanding Notions of Real Estate Lawyers' Liability to Non-Clients," The ACREL Papers, Fall 2002 (ALI-ABA); "From Screens and Walls to Screams and Wails: A Selective Look at Screening Among The Various Ethics Rules and Cases and "A Consideration of Some Unanswered Questions," The ACREL Papers, Fall, 2001 (ALI-ABA); and "The Ethics of Negotiations: Are There Any?" 56 Louisiana Law Review 447 (1995).

[3] The author is licensed to practice law only in Louisiana. This paper, while it refers to and discusses laws of other states, reflects a civil law attorney's outsider's view of common-law statutes, rules and jurisprudence.

[4] If they are licensed in Missouri, attorneys must comply with the Missouri Courts Rules of Professional Conduct. *See*: https://www.courts.mo.gov/page.jsp?id=707

publications professing the palliative of professionalism as a panacea for the perils of practice. CPAs must comply with the AICPA Code of Professional Conduct. CFPs must comply with the CFP's Code of Ethics and Standards of Conduct.[5] NAEPC members can look to the NAEPC's Code of Ethics.[6]

But when one examines these codes, one finds very little guidance about negotiations and whether the estate planner has an obligation to be truthful in discussing issues with a third party, for there always is a tension between client confidentiality and revealing the "truth" in third party negotiations.

While this paper primarily is focused on how the American Bar Association's Model Rules for Professional Conduct and the Missouri Rules of Professional Conduct relate to the personal moral principles that might guide or restrict the options of attorneys during negotiations, it also deals more generally with whether there is any legal, ethical, or moral obligation to be truthful in negotiations. The focus on the ABA Model Rules is because the rules of the NAEPC[7] the CFP Board,[8] and the AICPA Rules[9] do not appear

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Also see the ABA Model Rules of Professional Conduct:
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

[5] See: https://www.cfp.net/about-cfp-board/ethics-enforcement

[6] See: http://www.naepc.org/about/ethics

[7] *Id*. The NAEPC's "Code of Ethics" takes up but one page and contains hortatory language urging its members "to be fair." It is a self-regulatory code, and it expressly states that its members shall "regulate himself or herself."

[8] The CFP Board's Code states that "integrity demands honesty and candor," as well as "fairness," but these rule appear to deal with the relationship with the client, not with third parties. All that is required in relation to third parties is "dignity and courtesy." See: https://www.cfp.net/about-cfp-board/ethics-enforcement

> Principle 1 – Integrity: Provide professional services with integrity.
>
> Integrity demands honesty and candor which must not be subordinated to personal gain and advantage. Certificants are placed in positions of trust by clients, and the ultimate source of that trust is the certificant's personal integrity. Allowance can be made for innocent error and legitimate differences of opinion, but integrity cannot co-exist with deceit or subordination of one's principles.
>
> ***
>
> Principle 4 – Fairness: Be fair and reasonable in all professional relationships. Disclose conflicts of interest.
>
> Fairness requires impartiality, intellectual honesty and disclosure of material conflicts of interest. It involves a subordination of one's own feelings, prejudices and desires so as to achieve a proper balance of conflicting interests. Fairness is treating others in the same fashion that you would want to be treated.
>
> ***
>
> Principle 6 – Professionalism: Act in a manner that demonstrates exemplary professional conduct.
>
> Professionalism requires behaving with dignity and courtesy to clients, fellow professionals, and others in business-related activities. Certificants cooperate with fellow certificants to enhance and maintain the profession's public image and improve the quality of services.

to directly address negotiations with third parties.

2. DO THE RULES OF THE AICPA, CFP, and NAEPC REQUIRE TRUTH IN NEGOTIATIONS OR DEAL EXPRESSLY WITH NEGOTIATIONS?

The CFP's Ethics and Standards of Conduct[10] requires CFP professionals to act in the client's best interest, maintain confidentiality. "protect the privacy of client information," and "protect the security of non-public information about any client." But it says nothing about negotiations.

The AICPA Code of Professional Conduct[11] requires CPAs to maintain client confidentiality, prevent unauthorized disclosure of confidential information, and be honest and candid within the constraints of client confidentiality. But it says nothing about negotiations except that a CPA may "assist" a client in negotiations.

The NAEPC's Code of Ethics[12] requires its members to "uphold the integrity and honor of the profession" and "be fair," but it says nothing about either client confidences

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[9] The AICPA rules on misrepresentations involve those contained in financial statements or records, although there also is a rule prohibiting "knowingly misrepresenting facts," but this latter rule appears to be addressed to internal communications, not external ones. *See*:

https://www.aicpa.org/content/dam/aicpa/research/standards/codeofconduct/downloadabledocuments/2014december15contentasof2016august31codeofconduct.pdf

> 1.130 Preparing and Reporting Information
>
> 1.130.010 Knowing Misrepresentations in the Preparation of Financial Statements or Records
>
> .01 Threats to compliance with the "Integrity and Objectivity Rule" [1.100.001] would not be at an acceptable level and could not be reduced to an acceptable level by the application of safeguards and the member would be considered to have knowingly misrepresented facts in violation of the "Integrity and Objectivity Rule," if the member
>
> a. makes, or permits or directs another to make, materially false and misleading entries in an entity's financial statements or records;
>
> b. fails to correct an entity's financial statements or records that are materially false and misleading when the member has the authority to record the entries; or
>
> c. signs, or permits or directs another to sign, a document containing materially false and misleading information.
>
> 1.130.020 Subordination of Judgment
>
> .01 The "Integrity and Objectivity Rule" [1.100.001] prohibits a member from knowingly misrepresenting facts or subordinating his or her judgment when performing professional services for a client , for an employer, or on a volunteer basis. This interpretation addresses differences of opinion between a member and his or her supervisor or any other person within the member's organization.

[10] *See*: https://www.cfp.net/ethics/code-of-ethics-and-standards-of-conduct

[11] *See*:

https://www.aicpa.org/content/dam/aicpa/research/standards/codeofconduct/downloadabledocuments/2014december15contentasof2016august31codeofconduct.pdf

[12] *See:* http://www.naepc.org/about/ethics

or negotiations.

3. WHAT DO CLIENTS WANT IN NEGOTIATIONS AND WHAT CAN YOU GIVE THEM? THE LAWYER AS THE ZEALOUS ADVOCATE.

Every client wants a negotiator who gets all the client desires, leaves nothing on the table, and gives away the minimum. The dominant model of a lawyer is one who is a "zealous advocate"[13] of the client's position: it is a term indicating that the client's interest is paramount. As far back as 1820, Lord Brougham declared, in 2 Trial of Queen Caroline 8, "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction, which he may bring upon others."[14]

"Zealous advocate" is a term that is often used by lawyers to describe their role; however, that term has not existed in the "black letter" rules since the ABA Model Rules superseded the Model Code of Professional Conduct in 1983.[15] When the 1983 Model Rules ("MR") were adopted, the term "zealous advocate" was deleted, and in its place was a comment to MR1.3 that a "lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[16] The Comment (although not the black-letter text of MR1.3) cautions that a "lawyer is not bound to press for every advantage that might be realized for a client." This commentary has continued, almost verbatim into the "Ethics 2000" Revision to the Model Rules.[17]

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[13] The "zealous advocate" language was contained in Canon 7 of the Canons of Professional Ethics; it was not carried forward in the 1983 Model Rules of Professional Conduct or its subsequent versions.

[14]Quoted by Sharon Dolovich, "Ethical Lawyering and the Possibility of Integrity," 70 Fordham L.Rev. 1629 (2002), in her citing of Deborah L. Rhode's book, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION, 2000 at 15.

[15] The term "zealous" advocacy appeared in the EC 7-1 of the Model Code.

[16] This portion of the comments to the Missouri RPC (Rules of Professional Conduct) 4-1.3 is identical to the Comment to the ABA Model Rules.

[17] The ABA's "Ethics 2000 Commission" presented a draft of revised Model Rules to the ABA House of Delegates in 2001; the final action of the ABA House of Delegates took place in 2002. For more information on this, see the ABA's website on the "Ethics 2000 Commission," found at the following site (last visited 2/07/17):

http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html

In most states, the words "zeal" and "zealous" are not found in the Rules of Professional Conduct or Comments. While the ABA Model Rule continued the concept of zealous advocacy in the Preamble (but not in the black-letter rules), some states (such as Washington) have deleted even that reference and substituted the phrase "conscientiously and ardently,"[18] although other states have retained the concept of zealous advocacy in their comments.[19]

The fact that "zealous advocacy" has not been a requirement of the lawyer's code since 1983, however, has not stopped lawyers from using the phrase, courts from extolling it, or law reviews from publishing articles about it.[20] Some court opinions use the phrases "zealous advocate" and "zealous advocacy" in a favorable way,[21] and many cases have extolled the concept.[22] On the other hand, the Supreme Court has warned that "zealous advocacy does not displace [attorneys'] obligations as officers of the court,"[23]

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[18] Compare the ABA Preamble ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.") with the Washington Preamble ("As advocate, a lawyer conscientiously and ardently asserts the clients position under the rules of the adversary system.")

[19] See, for example, the Texas Rules Preamble (emphasis supplied): "2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. *As advocate, a lawyer zealously asserts the clients position* under the rules of the adversary system. . . . ." "3. In all professional functions, *a lawyer should zealously pursue client's interests within the bounds of the law*."

[20] See, for example, Liton Chandra Biswas, "Suitability of the Underlying Theories of Zealous Advocacy in Ensuring Justice: Laying the Ground to Look Beyond the Zealous Advocacy," 92 North Dakota Law Review 61 (2016); Frances C. DeLaurentis, "When Ethical Worlds Collide: Teaching Novice Legal Writers to Balance the Duties of Zealous Advocacy and Candor to the Tribunal," 7 Drexel Law Review 1 (2014); Jules Epstein, "Ruminations on an Ethical Issue When Examining the Child Witness: Zealous Advocacy or Destroying Evidence," 91 Widener Law Review 165 (2013); and Richard Lavoie, Am I My Brother's Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession," 44 Loyola University of Chicago Law Journal 813 (2013).

[21] *See, e.g., State v. Morgan*, 1 Mo.App. 22, 29 (1876): "The accused was represented by able and zealous advocates. . . ."

Also see: State v. Dugan (unreported), 2007 WL 2823300 (Wash.App. Div. 1, 10/01/07): "Dugan complains that counsel did not meet with him until a few days before trial. But he has not established either prong of the test for ineffective assistance. Defense counsel was clearly a zealous advocate on behalf of Dugan."; *State v. Myers* (unreported), 2006 WL 2262028 (Wash.App. Div. 2, 10/01/06): *State v. O'Cain* (unreported), 2003 WL 21690323, (Wash.App. Div. 1, 7/21/03). *Also see*: People v. Delgadillo, 275 P.3d 772, 778 (Colorado Court of Appeals, 2012): "At no point during the in camera proceeding was there a clear demarcation of when defense counsel had ceased testifying, and when, if at all, he was supposed to have transitioned back into the role of advocate. The record reflects defense counsel's inherent conflict in trying to simultaneously respond to questioning from the court and the prosecutor, justify his earlier advice to defendant, and remain a zealous advocate. . . . While laboring under these divergent pressures, defense counsel's ability to represent his client was materially limited.

[22] *See, e.g., Brown v. State*, 110 Nev. 846, 877 P.2d 1071, 1073 (Nev. Jul 26, 1994). "However much it may 'infuriate the jury,' a properly zealous advocate must do all he can to defend his client. * * * As one eminent defender wrote, "[c]ross examination is the only scalpel that can enter the hidden recesses of a man's mind and root out a fraudulent resolve.... [It] is still the best means of coping with deception, of dragging the truth out of a reluctant witness, and assuring the triumph of justice over venality." Louis Nizer, My Life in Court 366 (1961)." *Also see*: *A.L.L. v. People*, 226 P.3d 1054, 1060-61 (Colorado Supreme Court 2010): "Rather, where the facts and law leave no other option, a lawyer's conscientious and sensitive efforts to locate viable issues, honestly represent her client's impressions of injustice, and navigate the appellate process on her client's behalf are sometimes all that can be asked of a zealous advocate making a good faith argument. And where the client's rights to an appeal and to appellate counsel are protected by law, that role is not merely asked, it is mandated.

[23] *Azar v. Garcia*, 138 S.Ct. 1790, 1793 (2018).

and there are reported decisions[24] that have taken a more harsh view of those who attempt to use zealous advocacy as a shield against improper conduct.[25] Writers of a

[24] *See, e.g., State v. Lovely*, 125 N.H. 690, 697, 480 A.2d 847, 851 (1984)

> "A prosecutor has the duty to act as a zealous advocate in presenting the State's case. However, a "public prosecutor 'differs from the usual advocate [in that] his duty is to seek justice, not merely to convict.' " * * * Consequently, we hold a prosecutor to a high standard of conduct and integrity. * * * Although the prosecutor did not directly comment on the defendant's failure to testify, we have no difficulty in concluding that the remarks in question were improper"

[25] *Compare,* for example, two cases from Rhode Island: *McGinty v. Pawtucket Mutual Ins. Co*., 899 A.2d 504, 508 (R.I. 2006): "the attorney is duty-bound to serve as zealous advocate for his client. . . ."; and *Carlson v. Gillie*, 1997 WL 839902 (R.I. Super. 1997), unreported: "The ethical attack mounted by plaintiff's counsel is a tactical ploy of an overly-zealous advocate who cannot accept the jury's verdict and who is willing to do anything (including attacking the Court and the system) to try and overturn it. I will not be a part of this ploy."

Cases from Missouri include: *In re Coe*, 903 S.W.2d 916, 917 (Mo. *en banc* 1995) "Once a judge rules, a zealous advocate complies, then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge." In that case, the colloquy between the lawyer and the judge included:

> ATTORNEY: Can you in the name of Jesus be fair.
>
> THE COURT: You, lady, are getting a lot more fairness than you are entitled to in this courtroom.
>
> ATTORNEY: That's fine. I wish Jesus would touch you so you would stop being so bias[ed] every time I get up. It's a problem we can't go into this. When she asked him you let him answer. When I get up there I can't. And I am sick of it—I am sick of it.
>
> THE COURT: Are you quite through?
>
> ATTORNEY: Yes, I am through.
>
> THE COURT: The objection is overruled. . . .
>
> ATTORNEY: You do whatever you want to do. I am tired of you being unfair. When I ask about this incident I can't go into it.
>
> THE COURT: I am going to have you removed from the courtroom if you don't be quiet.
>
> ATTORNEY: You can do whatever you want. You are the judge. You are in charge. But I am sick and tired of you not letting these people testify directly . . . ."

Also see: *State v. Gordon,* 948 S.W.2d 673, 676 (Mo.App. E.D. 1997): ". . . zealous advocacy and professionalism do not encompass unsubstantiated accusations such as those made here against witnesses and prosecutors."

There are only a few cases from Kentucky. *Adams v. Lexington-Fayette Urban County Government*, (Cite as: 2009 WL 350600 (Ky.App.), reh. den. 5/28/09): "However, having reviewed the record, we find no reason to believe that [the attorney] was dishonest with the court concerning his participation in the investigation. He was a zealous advocate for his client. Again, we emphasize that disqualification is a drastic action taken only when absolutely necessary . . . ."; *Woodall v. Commonwealth of Kentucky*, (not reported in S.W.3d, 2005 WL 3131603 (Ky., reh. den. 2/232/06) "The record reflects that defense counsel acted reasonably, and advocated Appellant's plight as appropriate under the circumstances. Furthermore, even if defense counsel had been a more zealous advocate of this evidence . . . ." and *Forean v. Bowen,* 7 T.B.Mon. 409, 23 Ky. 409, 1828 WL 1287 (Ky. 1828) "The others are so obviously and palpably against Forean, that even to notice them would give them a consequence which the most zealous advocate can not be presumed to suppose them entitled to."

There appear to be only seven reported cases from Iowa courts that use the term "zealous advocate," and only one of them appears to use the term in a purely favorable fashion: *Iowa Supreme Court Attorney Disciplinary Bd. v. Rauch,* 746 N.W.2d 262 (Iowa 2008). "Our legal system depends on zealous advocates who are diligent and honest. See *Comm. on Prof'l Ethics & Conduct v. Bauerle*, 460 N.W.2d 452, 453 (Iowa 1990) ("Fundamental honesty is the base line and mandatory requirement to serve in the legal profession."). Rauch possesses neither of these qualities."

Other Iowa cases merely use the phrase in passing, refer to law review articles with this name, or mention it as defense asserted in a disciplinary matter. See: *State v. Boggs*, 741 N.W.2d 492 (Iowa 2007); *Hartnell v. State*, 695 N.W.2d 505 (Table) (Iowa App. 2005), *State v. Williams*, 2000 WL 1157832 (Iowa App. 2000); *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Zimmermann*, 522 N.W.2d 619 (Iowa,1994); *State v. Fryer*, 226 N.W.2d 36 (Iowa 1975); and *Koehler v. Hill*, 60 Iowa 543, 14 N.W. 738,(Iowa 1883).

Cases from Florida courts, include; *State v. Green*, 395 So.2d 532, 538 (Fl. S.Ct. 3/5/1981), " 'But not even the most zealous advocates suggest coverage of all trials in all courts.' "; *Whipple v. State*, 431 So.2d 1011, 1015 (Fl. 2nd DCA 5/13/1983), "The fact remains, however, that most of the cases cited by zealous advocates as being in direct conflict with our PCA decisions are simply not close enough to write about."; *Wilson v. Wainwright*, 474 So.2d 1162, 1165 (Fl. S.Ct. 8/15/1985): "However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate."; *accord*: *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fl. S.Ct. 6/26/1986) and *Hamilton v. State*, 573 So.2d 109, 111 (Fla. 4th DCA 1/4/1991); *Key Largo Restaurant v. T.H. Old Town Associates, Ltd*., 759 So.2d 690, 692 (Fl. 5th DCA 4/14/2000), involving a motion to disqualify an attorney who received confidences that a "zealous advocate" would likely use; *Yang Enterprises, Inc. v. Georgalis*, 988 So.2d 1180, 1183 (Fl 1st DCT 8/7/08), citing the dissent in *Key Largo* and finding that a writ for certiorari was filed as a "litigation tactic" which "caused the other party prejudice); *National Union Fire Ins. Co. of Pittsburgh, Penn. V. KPMG Peat Marwick*, 742 So.2d 328, 331 (Fl. 3rd DCA 7/28/1999), ". . . an attorney cannot be a zealous advocate for his client if he reveals confidential information about the client."' *Haliburton v. Singletary*, 691 So.2d 466, 472 (Fl. S.Ct. 1/9/1997), "Haliburton first claims that because appellate counsel failed to act as a zealous advocate, he was deprived of his

number of law review articles use "zealous advocate" in their titles to encapsulate a viewpoint about what this phrase might mean.[26]

A look at some specific cases using the phrase "zealous advocates" can be illuminating. Some opinions have used the phrase to denote approval of conduct designed to protect the client's interest, as in *State v. Dugan*, 140 Wash. App. 1037 (Wash. Div. 1, 2007), in which the court praised defense counsel's work as a zealous advocate.[27] Other cases, however, have indicated that zealous advocacy can cross the line into improper conduct. For example, *in re Contempt of Weaver*, 112 Wash. App. 1005 (Wash. Div. 2, 2002), a contempt sanction was upheld against an attorney who claimed that the improper question he asked a witness was done "in good faith . . . in the heat of battle."[28]

> The rationale of cases on what is acceptable or unacceptable zealous advocacy is not uniform. For example, some courts use the phrase "zealous advocate" favorably, but mostly in the context of criminal cases discussing the role of defense counsel.[29] Other opinions (mostly in a civil, disciplinary, or commercial

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right to the effective assistance of counsel. We disagree with his assertion . . . ."; *Olive v. Maas*, 811 So.2d 644, 654 (Fl. S.Ct. 2/14/2002); "Olive maintains that adhering to these provisions would cause him to violate the Rules of Professional Conduct. Specifically, Olive asserts that these "restrictions" would prohibit him from acting as a zealous advocate by, for example, preventing him from asserting a claim based on a change in the law applicable retroactively, or arguing for the expansion or modification of existing law. This contention lacks merit because the rules themselves prohibit a lawyer from asserting frivolous or successive claims." *Foster v. State*, 929 So.2d 524, 535 (Fl. S.Ct. 3/23/2006), " 'What is abundantly clear is that every member of this group of mostly African-Americans is convinced that neither Mr. Smallwood nor Mr. Kelley has any racial bias whatsoever, and that both attorneys have demonstrated themselves to be zealous advocates for clients of all races. The Court finds no reason to conclude otherwise.' "

[26] *See, e.g.,* Carlin, "Civility Should be the Rule, Not the Exception: Zealous Advocacy and Professionalism," 56 DRI for the Defense 81 (2014); Gaither, "When Zeal Meets Dishonesty," 44 Maryland Bar Journal 53 (2013); Kameen, "Rethinking Zeal: Is It Zealous Representation or Zealotry?" 44 Maryland Bar Journal 4 (2011); Broderick, "Understanding Lawyers' Ethics: Zealous Advocacy in a Time of Uncertainty" 8 U. D.C. L. Rev. 219 (2004); Reimer, "Zealous Lawyers: Saints or Sinners?" 59 Or. St. B. Bull. 31 (1998); Brown, "A Plan To Preserve An Endangered Species: The Zealous Criminal Defense Lawyer" 30 Loy. L.A. L. Rev. 21 (1996); and Ventrell, "The Child's Attorney: Understanding the Role of Zealous Advocate" 17 WTR Fam. Advoc. 73 (1995)8; and Robert g. Day, 45 Stanford Law Review (1993): "Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Fact of Expanded Attorney Liability."

[27] *See*, for example, *Smith v. Damato*, 172 Neb. 811, 817, 112 N.W.2d 21, 25 (NE 1961), quoting with approval from *Sonneman v. Atkinson*, 121 Neb. 752, 238 N.W. 5423 (1931): "Both parties had able, vigorous and apparently zealous advocates. In the temperature reached near climax of the trial they went about as far as permissible."

[28] Compare: *State v. Koenig*, 278 Neb. 204, 208, 769 N.W.2d 378, 384 (Neb. 2009), the Court stated: "We agree . . . that attorneys have the right to negotiate on behalf of their clients and are even charged by the Nebraska Rules of Professional Conduct to zealously assert their client's position. A lawyer must zealously advocate, however, 'under the rules of the adversary system.' While [the attorney's] conduct might be considered zealous advocating of his client's position, it does not fall within the ethical bounds of our adversary system."

[29] *See*: *People v. Garcia*, 17 Misc.3d 1106(A), 851 N.Y.S.2d 60, 2007 WL 2871008, (Unreported Disposition, N.Y.Just.Ct., September 24, 2007); "When should an attorney disqualify or recuse himself or herself in a criminal case? The Court finds that an attorney should decline representation or ask to be relieved when the appearance of a conflict rises to the level where the lawyer cannot be a zealous advocate due to the nature of the conflict, and the defendant's rights are being compromised. * * * * Whether they are before the Supreme Court of the United States or this humble Village Court, or whether they are representing the wealthy or the poor, the duty of attorneys remains unchanged, and that is to be zealous advocates for their clients within the bounds of the law";

context) use the phrase either cautiously or as a method of warning lawyers about improper tactics, although there are still cases extolling the zealous advocate's role.[30]

A number of these courts have criticized lawyers for failing to recognize that zealous advocacy does not excuse improper or sanctionable conduct.[31] Similar comments are found in some state bar's ethics opinions.[32]

Wahid v. Long Island R. Co., 15 Misc.3d 1120(A), 839 N.Y.S.2d 438, 2007 WL 1119905, 2007 N.Y. Slip Op. 50777(U), Unreported Disposition, N.Y.Sup., April 16, 2007(No. 25132/2004.), "In all cases, attorneys, whether they work as in-house counsel or as outside legal counsel, must be aware that they serve not only as zealous advocates, but also as officers of the Court subject to discovery obligations, the CPLR, and Disciplinary Rules of the Code of Professional Responsibility."; *People v. Henriquez*, 3 N.Y.3d 210, 818 N.E.2d 1125, 785 N.Y.S.2d 384, 2004 WL 2339594, 2004 N.Y. Slip Op. 07407, , N.Y., October 19, 2004, "In this case, the trial court was confronted with a defendant attempting to abuse the process. * * * It is far preferable for an accused, bent on controlling every aspect of the defense case and undermining counsel's ability to act as a zealous advocate, to accept self-representation and proceed pro se with assigned counsel serving not as an attorney but as a standby legal advisor."; Then as well as now, however, it appears that the defense's perception of the trial evidence is as was seen and heard by a zealous advocate. That view is noble and faithful to the highest traditions of the profession."; *People v. Dean*, Not Reported in N.Y.S.2d, 2003 WL 21276355, 2003 N.Y. Slip Op. 50933(U), , N.Y.Co.Ct., May 23, 2003(Ind. No. 2577-2001.), "Then as well as now, however, it appears that the defense's perception of the trial evidence is as was seen and heard by a zealous advocate. That view is noble and faithful to the highest traditions of the profession."; *People v. Toms*, 191 Misc.2d 585, 743 N.Y.S.2d 690, 2002 WL 1315434, 2002 N.Y. Slip Op. 22565, , N.Y.Co.Ct., May 24, 2002, "What ought to be of greater concern is the appearance and, indeed the potential, that attorneys may be less than zealous advocates because they can-not afford to invest the time to do so in cases that are complex and/or protracted because of an inability to obtain fair compensation for the additional work needed in those cases which present extraordinary circumstances. Attorneys, even the most dedicated ones, are human. Faced with harsh economic realities of being reimbursed at rates which barely cover their office overhead, they will be forced to avoid cases that are complex and/or protracted because of the diminishing economic return for their investment of the additional hours it takes to address such cases at the expense of the balance of their practices." (quoting with approval from *People v. Brisman*, 173 Misc.2d 573, 588, 661 N.Y.S.2d 422 [Sup. Ct. New York County 1996]); *People v. Deblinge*r, 179 Misc.2d 35, 683 N.Y.S.2d 814, 1998 WL 892130, 1998 N.Y. Slip Op. 98680, , N.Y.Sup., November 06, 1998, "Attorneys are required by the rules of ethics to be zealous advocates for their clients' causes. Even if counsel's objections strike at the heart of the court's conduct, there is no excuse for failing to register a timely protest."; *People v. Collins*, 173 Misc.2d 350, 660 N.Y.S.2d 946, 1997 WL 405463, 1997 N.Y. Slip Op. 97367, , N.Y.Sup., May 30, 1997, "Unlike a defense attorney, whose duty is zealous advocacy on behalf of his client, a prosecutor is a quasi-judicial official. His conduct must meet a higher standard because he has the resources and power of the state to utilize against the accused."; *State v. Brisman*, 173 Misc.2d 573, 661 N.Y.S.2d 422, 1996 WL 905940, 1997 N.Y. Slip Op. 97369, , N.Y.Sup., October 09, 1996, "Several competing public policy concerns and issues are implicated in the consideration of the issue-at-bar, to wit: * * * the assertion that an appearance of impropriety may be created in situations in which attorneys are perceived as less zealous advocates for their clients to avoid alienating a judge with the power to increase fees; and 6) the allegation that the fact that some judges * * *";

[30] *See*: *In re Heller*, 9 A.D.3d 221, 780 N.Y.S.2d 314, 2004 WL 1415461, 2004 N.Y. Slip Op. 05529, , N.Y.A.D. 1 Dept., June 24, 2004, "In our view, however, it strains credulity that respondent, the self-proclaimed "zealous advocate", would sign a critical affidavit in a serious matter without thoroughly vetting it. In any event, in signing an affidavit, an affiant swears to the truth of the statements therein."; *B.A. v. L.A*., 196 Misc.2d 86, 761 N.Y.S.2d 805, 2003 WL 21246118, 2003 N.Y. Slip Op. 23579, , N.Y.Fam.Ct., May 09, 2003, "Since there exists a reasonable possibility that the law guardian can take an adverse position to that of one party in any visitation or custody case in which they represent the child, to describe the law guardian's role as "a neutral" discounts their role as a zealous advocate for the child participating fully in both pre-trial and trial procedures. * * * A trial court cannot substitute its judgement [*sic*] for that of a defense attorney, who, within the bounds of ethics and law, must be a zealous advocate for his client."; *Adams v. Clark*, 224 A.D. 336, 230 N.Y.S. 684, , N.Y.A.D. 4 Dept., September 26, 1928, "We are aware that in a closely contested trial the heat of conflict sometimes partially overcomes zealous advocates, and that oftentimes counsel must be allowed some latitude in their efforts to excel in deportment. But the claimed infractions in the instant case upon the rule that counsel must be fair and temperate may have had an improper influence upon the jury. And, while we are not disposed to base our reversal directly upon irregular conduct of counsel, we feel impelled to express our disapproval."

Cf: *O'Malley v. Macejka*, 44 N.Y.2d 530, 378 N.E.2d 88, 406 N.Y.S.2d 725, , N.Y., June 06, 1978, "For a legislator properly may act as the zealous advocate of the most partisan of causes. Indeed,**90 legislators often seek election on the basis of their support of particular programs or groups with whose special interests they may openly align themselves."; and *Lewis v. Few*, 5 Johns. 1, 1809 WL 1233, , N.Y.Sup., 1809, "The defendant was a man of talents, possessed of great political information, a conspicuous and zealous advocate for liberty, and well instructed in all the rights and privileges of British freedom; yet we do not find a hint of any such privilege of an elector, as that now claimed by the present defendant."

[31] *See, e.g. The Florida Bar v. Morgan*, 938 So.2d 496, 500 (Fl. S.Ct. 6/22/2006), in which a lawyer was given a 91-day rehabilitative suspension for a colloquy with the trial judge. In sustaining the suspension, the Florida Supreme Court stated: "Like the attorney in

The comments to §16 of the ALI's Restatement of the Law Governing Lawyers ("ALI") warn that "zealous advocacy" is not a synonym for hardball tactics. The Comment states that the "term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling."[33]

Wasserman, Morgan admits his conduct was inappropriate, but seems to believe it is his obligation as a zealous advocate to take a judge 'to task' if he comes to believe he or his client is being treated unfairly."

Also see De Vaux v. Westwood Baptist Church, 953 So.2d 677, 684-685 (Fl. 1st DCA 4/4/2007) (footnotes omitted):

> "This case is not an instance of a court chilling creative lawyering. See generally, Monroe H. Freedman & Abbe Smith, Understanding Lawyer's Ethics 97-8 (Matthew Bender 2004). Certainly, lawyers are expected to be zealous advocates for the interests of their clients. They are also officers of the court, however, even though these two roles may sometimes appear to be in conflict. See generally, Eugene R. Gaetke, Lawyers as Officers of the Court, 42 Vand. L.Rev. 39, 40 (1989). As an officer of the court, among other things, a lawyer must not file frivolous claims, rule 4-3.1, Rules Regulating The Florida Bar, or unnecessarily burden third parties, rule 4-4.4. See generally, David B. Wilkins, Who Should Regulate Lawyers? 105 Harv. L.Rev. 799, 815 (1992). Said another way, an attorney has a duty to refrain from advocacy, such as filing frivolous claims, which undermines or interferes with the functioning of the judicial system. See *Malautea v. Suzuki Motor Co., Ltd.,* 987 F.2d 1536, 1546 (11th Cir.1993)("An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself."). A lawyer who files a frivolous lawsuit or a meritless appeal on the instructions of the client without informing the client of the weakness of the claim is violating both a duty to serve the client's interests and a duty to the judicial system. See generally, *Mullins v. Kennelly*, 847 So.2d 1151, 1154 (Fla. 5th DCA 2003)."

Further, see *Rosenberg v. Gaballa* 2009 WL 129611 (Fl. App. 4 Dist. 1/21/09): "This Court did not find credible Mr. Rosenberg's testimony that he was acting merely as a zealous advocate for his clients."

The Nevada Supreme Court has used the phrase with approval when it wrote: "However much it may 'infuriate the jury,' a properly zealous advocate must do all he can to defend his client." *Brown v. State*, 110 Nev. 846, 877 P.2d 1071, 1073 (Nev. Jul 26, 1994). In the very next sentence, the *Brown* court wrote: "As one eminent defender wrote, "[c]ross examination is the only scalpel that can enter the hidden recesses of a man's mind and root out a fraudulent resolve . . . . [It] is still the best means of coping with deception, of dragging the truth out of a reluctant witness, and assuring the triumph of justice over venality." Louis Nizer, My Life in Court 366 (1961)."

Also see: *In re Shawe & Elting*, LLC, 2015 WL 4880469 (unreported), (Delaware Court of Chancery 2015): "The trial court did not abuse its discretion in concluding under the circumstances counsel had crossed the line from zealous advocacy into obstruction, delay, and harassment, and that such tactics, if allowed to continue, would make consumer protection law a dead letter."; and *Stiles v. Demoulas Super Markets, Inc*., 33 Mass. L. Rptr. 306 (Mass. Superior Court, Suffolk County 2016): "Regardless of counsel's subjective intent, there can be no doubt that by these arguments, Stiles' counsel intended the jury to infer that Stiles was pitted against a large, wealthy corporation, and that the jury must rise to the occasion, right a corporate wrong, and ensure that Demoulas pay Stiles. These arguments amount to nothing more than a "covert appeal to partiality and prejudice" that crossed the line between zealous advocacy and improper argument."

There is also *Thomerson v. Commonwealth ex rel. Conway*, 2016 WL 4256913 (Kentucky Court of Appeals, 2016) (unpublished):" The trial court did not abuse its discretion in concluding under the circumstances counsel had crossed the line from zealous advocacy into obstruction, delay, and harassment, and that such tactics, if allowed to continue, would make consumer protection law a dead letter." Note, however, that under Kentucky Rules of Civil Procedure 76.28(4)(c), "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action."

[32] *See, e.g., the following Kentucky Bar Association's ethics opinions*: E-425 (June 2005) ("Some commentators have suggested that the lawyer's participation in the collaborative process may be inconsistent with the duty of zealous representation. This so-called "duty" has its roots in Canon 7 of the former Code of Professional Responsibility, and was most often associated with the tough lawyer involved in litigation (the hired gun). Today's Rules of Professional Conduct, adopted in Kentucky in 1990, no longer impose a duty of zeal, but rather impose duties of competence and diligence."); E-331 (Sept. 1988) ("The insured is entitled to competent and zealous representation, . . ."); E378 (March, 1995) ("We have previously held that the insured is entitled to competent and zealous representation that is not adversely affected by prohibited conflicts of interest. KBA E-331."); E-272 (July 1983) ("pressure . . . which would prevent the attorney from zealously and independently representing the client (Canon 7 and 5); E-279 (January 1984) ("Canons 6 and 7 of the Code of Professional Responsibility require a lawyer to exercise competence in the zealous representation of his client.") E-159 (Jan. 1977) (When lawyers who share offices represent adverse interests, there must always be some temptation to moderate zeal on behalf of the client in the interest of harmony in the office. . . . However, a large part of the lay public believes that in these circumstances, one or both of the clients will get representation that is less than zealous.")

[33] ALI §16, Comment (d).

While the label of "zealous advocate" gives some solace for the forcefulness with which a lawyer can act for the client and gives others concern about hardball tactics, the same concept may be restated by describing a lawyer as a "neutral partisan,"[34] a term that suggests moral relativism. A "neutral partisan" is one who "passes no judgments,"[35] whose "zeal on behalf of the client is unmitigated and noncontingent." The ABA Model Rule revisions to the Model Rules maintain the view that the lawyers' personal morality is not impugned because of the client's activities. See the ABA Model Rule 1.2(b): "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."

It is often said that, by serving the client's interests, a lawyer furthers society's goals, in contrast to the accountant, whose primary duty runs directly to the public and only secondarily to the client. As the Securities and Exchange Commission opined more than 40 years ago: "Though owing a public responsibility, an attorney in acting as the client's advisor, defender, advocate and confidant enters into a personal relationship in which his principal concern is with the interests and rights of his client. The requirement of the [Exchange] Act of certification by an independent accountant, on the other hand, is intended to secure for the benefit of public investors the detached objectivity of a disinterested person."[36]

Whether we prefer to be called "zealous advocates" or "neutral partisans," this standard view of a lawyer's role has been described as "both amoral and highly ethical. It is amoral in the sense that, however morally questionable the clients' ends and however zealous the lawyer is in their pursuit, the lawyer is thought to bear no moral responsibility for either the content of the ends or their achievement."[37] While lawyers look askance at

[34] Dolovich, *supra*, (her article fn7), traces the origin of the term to William Simon in his article "The Ideology of Advocacy: Procedural Justice and Professional Ethics," 1978 Wis. L. Rev. 29. For more on ethicist Simon's views, see William H. Simon, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS (1998).

[35] Sharon Dolovich, "Ethical Lawyering and the Possibility of Integrity," 70 Fordham L.Rev. 1629 (2002).

[36] *In re American Fin. Co*., 40 S.E.C. 1043, 1049 (1962), quoted by Dolovich, *supra*.

[37] Dolovich at 1633.

such criticism, claiming that an adversarial system of justice not only is the most just but that, without the ability to represent unpopular interests, constitutional rights cannot be fully protected, others ignore the higher aims of protecting the constitutional and statutory rights of all and aim criticism at the profession, claiming that, "[f]or most lawyers, most of the time, pursuing the interests of one's clients is an attractive and satisfying way to live in part just because the moral world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life."[38]

4. ARE THE "RULES OF ETHICS" REALLY ETHICAL?

"Ethics" is the term that is commonly applied to lectures about the ABA's Rules of Professional Responsibility and its predecessor, the Code of Professional Conduct. These 1983 Model Rules and the current ABA Model Rules, however, do not use the word "ethics" at all, other than in the Scope section to indicate that the rules "simply provide a framework for the ethical practice of law." The question is whether the Rules actually do this.

One critic of the lack of ethical emphasis in the Model Rules uses the pejorative term "amoral technicians"[39] to describe lawyers, claiming that the Model Rules provide "a highly simplified moral universe which offers easy guideposts for action that allow lawyers to sidestep wrenching ethical dilemmas, and with the luxury of acting on behalf of clients free from the risk of moral censure."[40] Another has commented that a lawyer

[38] Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues," 5 Hum. Rts. 1, 9 (1975), quoted with approval in Dolovich, fn. 33.

[39] *Id*. at 1638.

[40] *Id.*, describing the views of Deborah L. Rhode in her book, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION, 2000.

"sees his more degrading activities as licensed by a fundamental amorality lying beneath conventional morality."[41]

The three main federal rules and statutes that regulate sanctionable conduct (FRCP 11, FRAP 38, and 28 U.S.C. §1927) do not use the term "ethics" either.

The problem is that there is an unresolved tension between two concepts: (a) the need to represent the client fully and zealously and to maintain client confidences, and (b) the expectation of some members of the public and press, and of some federal regulators, that lawyers, as officers of the Court, should reveal matters that can cause losses to others. These two concepts are inherently irreconcilable; you cannot fully protect one without eviscerating the other. The greater the protection one gives to client confidences, the less "truth" the lawyer is able to reveal, for any revelation of a client confidence is a breach of that obligation. On the other hand, the more one seeks to have lawyers disclose information that may prevent losses to non-clients, the less protection a client has for the confidences reposed in and disclosed to the lawyer.

These two tensions are apparent by looking at what some have said about a lawyer's role.

- "To mislead an opponent about one's true settling point is the essence of negotiation."[42]
- Justice Stevens: "I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation."[43]
- "Just as the orderly and systematic slaughter which we call war is thought perfectly right under certain circumstances, though painful and revolting: so in the word-contests of the law-courts, the lawyer is commonly held to be justified in untruthfulness within strict rules and limits: for an advocate

[41] Nancy Lewis, *supra* at 813, quoting William H. Simon.

[42] White, MacElvelly "*Ethical Limitations on Lying in Negotiations*," 1980 American Bar Foundation RES.J. 926, 928.

[43] *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 413, 110 S.Ct. 2447, 2464-65 (1990), Justice Stevens, concurring in part and dissenting in part.

is thought to be over-scrupulous who refuses to say what he knows to be false, if he is instructed to say it."[44]

- "We might exercise our supervisory powers if we thought there were an ethical violation involved." But the Court would not exercise supervisory powers for a breach of a potential professional violation.[45]

5. A BRIEF HISTORY OF THE ABA MODEL RULES

In ascertaining whether there always has been a dichotomy between ethics and professionalism, it is instructive to look at the history of bar promulgations on the subject.

The American Bar Association's original Canon of Professional Ethics was adopted on August 27, 1908 and can be traced back to the Alabama Bar Association's 1887 Code of Ethics and from there back to two books published in 1836 and 1854.[46] For almost a hundred years the Canons formed the touchstone of lawyer conduct.

The Canons evolved in 1969 into the Model Code of Professional Responsibility. The Model Code was divided into "Ethical Considerations," aspirational goals for attorneys, written in hortatory language, and "Disciplinary Rules," mandatory provisions akin to penal statutes which formed the basis for disciplinary proceedings.

In 1983 the ABA adopted the Model Rules of Professional Conduct. Gone were the aspirational goals that the Ethical Considerations illuminated. In their place were purely minimal standards of conduct written in the style of a penal code – the three phrases used are: "a lawyer shall not," "a lawyer shall," and "a lawyer may." The Bar's transformation was complete. It had come full circle from a profession whose members took it for granted that they owed duties to the public and to the courts, to one whose

[44] H. Sidgwick, THE METHODS OF ETHICS, 7th Ed. (London: Macmillan & Co., 1907).

[45] *U.S. v. Bautista*, 23 F.3d 726, 732 (2nd Cir. 1994), *cert. den*. 513 U.S. 862 (1994). The alleged breach was a prosecutor talking to a witness during an adjournment; the Court find no problem with this since the issue was elicited by the prosecutor on re-direct and the witness was subjected to cross-examination on this topic.

[46] A history of the ABA's rules can be found in ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Second Edition, pages 1-2 (1992), published by American Bar Association's Center for Professional Responsibility. The two books were: PROFESSIONAL ETHICS, by Judge George Sharswood (1854), and A COURSE OF LEGAL STUDY (2d ed. 1836) by David Hoffman.

written rules provided both high-minded guidelines as well as disciplinary rules, to one whose sole guidance was now found in a quasi-criminal statute.

Unfortunately, because the old Code was rightly called one of "Professional *Ethics,*" we tend to think that the current Model Rules are also ethical standards; they are not. An attorney can take positions that many would find uncivil or even morally questionable and still abide by the Model Rules. Likewise, an attorney can have a reputation in the bar as an unfair "hardball" litigator, intransigent on every issue, even ones of courtesy, and still comply with Rule 11. This may be the reason for the evolution of the "professionalism" standards and the various codes of courtesy that are being adopted by many local bar associations around the country. Although not all such "professionalism" codes are limited to litigation, when one reviews them as a whole, it is clear that abusive litigation conduct is at the heart of what such formulations are designed to address.

6. TRUTHFULNESS v. CLIENT CONFIDENCES

The ABA, in its initial 2002 adoption the ABA Model Rules, rejected any broad expansion of a lawyer's traditional role and refused to lessen the stringent requirements of confidentiality under Rule 1.6. A debate ensued over whether a lawyer was bound by client confidentiality even if the lawyer's work, unbeknownst to the lawyer, had caused or would cause harm to others. While initially rejecting any breach of confidentiality rules, the ABA eventually adopted the current version of Rule 1.6, which allows a lawyer to breach confidential communications in certain limited instances. [47]

[47] ABA Model Rule 1.6 reads (emphasis supplied):

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph
> (b) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

Some states depart from ABA Model Rule 1.6 in ways that either expressly permit actions that the Model Rule expressly prohibits[48] or prohibit actions that the Model Rule expressly permits. For example, in some states:

- The ABA Rule allows disclosure of confidences to prevent a "crime or fraud," but in some states this applies only to prevent a "criminal act." Fraud may not be seen as a basis to breach a confidence.[49]
- The ABA Model Rule also allows a breach of the privilege "to mitigate or rectify" a crime or fraud. Some states only allow a breach of the confidences to prevent a potential, future criminal act.
- Under the ABA Model Rule, the "crime or fraud" exception applies only if the furtherance of the crime of fraud involves the lawyer's services. Some states,

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(1) to prevent reasonably certain death or substantial bodily harm; or

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in **substantial injury to the financial interests or property** of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify ***substantial injury to the financial interests or property of another*** that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order.

(7) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representations of a client.

[48] *See*, for example, the New Hampshire rules. A redline comparison of New Hampshire Rule 1.6 and the ABA Model Rule follows:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm~~,~~ or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in **substantial injury to the financial interests or property** of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify ***substantial injury to the financial interests or property of another*** that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

~~(4)~~*(2)* to secure legal advice about the lawyer's compliance with these Rules;

~~(5)~~ *(3)* to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

~~(6)~~ *(4)* to comply with other law or a court order.

[49] For example, consider Nebraska's Rule 3.501.6(b)(1); the following redline shows how its version varies from the Model Rule. Nebraska picks up the "reasonably certain death or substantial bodily harm" from Model Rule 1.6(b)(1) and combines it with Model Rule 1.6(b)(2), but eliminates any language referring to fraud:

(2) to prevent the client from committing a crime ~~or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services~~ ***or to prevent reasonably certain death or substantial bodily harm.***;

however, allow breaching the confidence for "criminal acts" regardless of the lawyer's involvement in furtherance of those acts.[50]

Thus, while "disclosure of client confidences is an extreme and irrevocable act,"[51] some states permit lawyers to breach client confidentiality for elderly clients in the event of suspected elder abuse, even if the client refuses to consent to the waiver of confidentiality.[52]

A look at some of the specific state variations on waivers of confidentiality illustrates the different approaches that have been taken.

a. <u>Missouri</u>

Missouri's version of Rule 1.6[53] is different in many ways from the ABA Model Rule. For instance, under the ABA Model Rule, a client may reveal confidences when a client has used the lawyer's services to commit a crime or a fraud and the revelation is necessary to either prevent or rectify a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another. Under the Missouri version of the rule, however, this language is missing, so even if the lawyers services are being used to commit a crime or fraud and the others may suffer substantial injury, the lawyer who speaks up to prevent the injury can lose his or her license to practice law. Some may argue that while the Missouri rule fully protects clients confidences, it does not protect the public at large.

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[50] See the Nebraska rule, quoted at footnote 49, above.

[51] The New Hampshire Comment to Rule 1.6 states (emphasis supplied):

The New Hampshire Rule permits the disclosure of any criminal act involving death or bodily harm or substantial injury to the financial interest or property of another. Rule 1.6 should not be viewed as a departure from the general rule of client confidentiality, and should not be interpreted to encourage lawyers to disclose the confidences of their clients. *The disclosure of client confidences is an extreme and irrevocable act.* Hopefully no New Hampshire lawyer will be subject to censure for either disclosing or failing to disclose client confidences, as the lawyer's individual conscience may dictate.

[52] *See* New Hampshire Bar Ethics Committee Advisory Opinion #2014-15/5, found at the following URL (last visited 02/07/17): https://www.nhbar.org/legal-links/Ethics-Opinion-2014-15_05.asp

[53] Missouri Rule 4-1.6:

https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/b284eee6f79f447486256ca6005211ee?OpenDocument

b. **Arizona**

Arizona's version of Rule 1.6, in contrast to MR 1.6, compels disclosure of "such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm." Note that this provision deals only with criminal acts. The test here, unlike M.R. 1.6, is whether death or substantial bodily harm is "likely to result," which is a different standard than M.R. 1.6's test of "reasonably certain death or substantial bodily injury."

Moreover, Arizona's version of 1.6 adds an additional provision permitting a lawyer to "reveal the intention of the lawyer's client to commit a crime," no matter what kind of crime is involved.

c. **California**

California's version of M.R. 1.6, found in its Rule 3-300[54] limits permissive disclosure of criminal acts by requiring that the lawyer first "make a good faith effort" to dissuade the client and, if that fails, to tell the client that the lawyer will be revealing this information.

[54] California Rule 3-100 states:

Rule 3-100 Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii);

and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

d. **District of Columbia**

DC's version of Rule 1.6[55] contains an express definition of what constitutes a "confidence," which includes information acquired "prior to becoming a lawyer in the course of providing assistance to another lawyer."

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[55] D.C. Rules of Professional Conduct: Rule 1.6--Confidentiality of Information

(a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

(1) reveal a confidence or secret of the lawyer's client;

(2) use a confidence or secret of the lawyer's client to the disadvantage of the client;

(3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

(b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

(c) A lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer; or

(2) to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes that such acts are likely to result absent disclosure of the client's confidences or secrets by the lawyer.

(d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

(e) A lawyer may use or reveal client confidences or secrets:

(1) with the informed consent of the client;

(2) (A) when permitted by these Rules or required by law or court order; and

(B) if a government lawyer, when permitted or authorized by law;

(3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client;

(4) when the lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure of a confidence or secret in order to carry out the representation;

(5) to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee; or

(6) to the extent reasonably necessary to secure legal advice about the lawyer's compliance with law, including these Rules.

(f) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that such persons may reveal information permitted to be disclosed by paragraphs (c), (d), or (e).

(g) The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment.

(h) The obligation of a lawyer under paragraph (a) also applies to confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer.

(i) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Lawyer Counseling Committee, or as a trained intervenor for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Information obtained from another lawyer being counseled under the auspices of the committee, or in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule.

(j) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Practice Management Service Committee, formerly known as the Lawyer Practice Assistance Committee [1], or a staff assistant, mentor, monitor or other consultant for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Communications between the counselor and the lawyer being counseled under the auspices of the committee, or made in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule. However, during the period in which the lawyer-counselee is subject to a probationary or monitoring order of the Court of Appeals or the Board on Professional Responsibility in a disciplinary case instituted pursuant to Rule XI of the Rules of the Court of Appeals Governing the Bar, such information shall be

The DC rule makes the discretionary disclosure of confidential information concerning death or substantial bodily harm dependent on whether these injuries would occur "absent disclosure."

e. **Illinois**

Unlike MR 1.6, where disclosure of information that may lead to preventing "reasonably certain death or substantial bodily harm" is discretionary, the Illinois version of 1.6 makes disclosure mandatory.[56]

f. **Florida**

Florida's version of Rule 1.6(b) makes some disclosures mandatory, including preventing a client from committing a crime and preventing "a death or substantial bodily harm to another."[57] Certain other disclosures are discretionary, but whether the disclosure

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subject to disclosure in accordance with the order. (k) The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.

[56] Illinois: RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order; or.

(7) to detect and resolve conflicts of interest if the revealed information would not prejudice the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

[57] Florida Rule 4-1.6, Confidentiality of Information:

(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

is "mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes" of the Florida rule.

g. **Michigan**

Michigan's version of Rule 1.6 [58]contains an express definition of a "confidence"; that definition is identical to the one contained in DC's version of Rule 1.6.[59] Unlike both

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(b) When Lawyer Must Reveal Information. A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:
(1) to prevent a client from committing a crime; or
(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:
(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
(3) to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;
(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(5) to comply with the Rules Regulating The Florida Bar; or (6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

(e) Inadvertent Disclosure of Information. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(f) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule

[58] Michigan Rule: 1.6 Confidentiality of Information

(a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:
(1) reveal a confidence or secret of a client;
(2) use a confidence or secret of a client to the disadvantage of the client; or
(3) use a confidence or secret of a client for the advantage of the lawyer or of a
third person, unless the client consents after full disclosure.
(c) A lawyer may reveal:
(1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;
(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;
(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and
(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.
(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

[59] See footnote 55, above.

the DC rule and the ABA Model Rule, however, the Michigan version does *not* permit an attorney to reveal matters relating to reasonably certain death or substantial bodily harm.

h. **Nevada**

Nevada's version of Rule 1.6 tracks the ABA Model Rule with one important difference; it requires mandatory (not discretionary) lawyer disclosure of information to prevent reasonably certain death or substantial bodily harm; however, the mandatory disclosure requirement applies only if the harm is a result of a criminal act.[60]

i. **New Jersey**

New Jersey's version of Rule 1.6 contains several important variations from the Model Rule.[61]

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[60] Nevada's Rule 1.6 same as ABA Model Rule, except that it adds a subparagraph (d):

(d) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm.

[61] New Jersey RPC 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to prevent the client from causing death or substantial bodily harm to himself or herself;

(4) to comply with other law; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership, or resulting from the sale of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. Any information so disclosed may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.

(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

(f) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

First, there is mandatory disclosure concerning client actions that can result in "death or substantial bodily harm." That disclosure, however, is limited client actions that involve a crime, are illegal, or are fraudulent. The lawyer in such an instance is permitted to notify the intended victim.

Second, the discretionary disclosure for death or substantial bodily harm is limited to actions where the harm is to the attorney.

Third, as a result of these two rules, there is no ability of lawyers in New Jersey to notify those who may be subject to the client's actions that could result in death or substantial bodily harm unless a crime, illegal activity, or fraud is involved. Mere negligence or even an intentional act by a client short of a crime or fraud that threatens life apparently cannot be revealed by the attorney.

7. THE CURRENT MODEL RULES CONDONE SOMETHING LESS THAN TRUTHFULNESS

To some, calling the Model Rules "ethical" rules is a misnomer, for the Rules allow for questionable behavior from a moral outlook that is defensible only when looked at from the dual viewpoints of the adversarial process and the perceived need to preserve client confidences.

When the Model Rules were drafted, the ABA specifically *rejected* requiring truth in negotiations.[62] The Preamble contained hortatory language which was adopted:

> "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others."

[62] The history of the Model Rules is found in "The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates," published by the Center for Professional Responsibility, American Bar Association, 1987.

In the Rules themselves, however, there is no requirement of honest dealing. This is because of the tension between protecting a client's confidences on the one hand and encouraging an adversary system, not only in court but also in negotiations.

Rule 4.1 deals with negotiations. As proposed in 1983, Rule 4.1 prevented a lawyer from knowingly making a false statement of material fact or law and would have required disclosure of client confidences in furtherance of the Rule. The language requiring truthfulness, even if it revealed a potential client confidence, however, was deleted by the ABA;[63] many states, adopted the ABA rule verbatim, although some other states have not.[64] There is also a tension between Rule 4.1 (dealing with negotiations) and Rule 1.6 (dealing with client confidences) that have led some to question whether the mandatory disclosure under Rule 4.1(B) trumps Rule 1.6's discretionary disclosure under certain circumstances.[65]

Fair dealing and absolute truthfulness during negotiations (in matters outside of tribunal settings) have never been requirements of the Model Rules, with exceptions made only for fraud and criminal activity. The ABA Comments to the Rules make for interesting reading, for they specifically allow "puffing," "failing to be truthful about

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[63] The revision of Model Rule 4.1 showing the deleted and added language, is as follows:

"(a) In the course of representing a client a lawyer shall not knowingly:

(1a) make a false statement of material fact or law to a third person; or

(2b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

[64] For a comparison of state law variations in the Model Rules, see the following ABA site (last visited 02/-7/17):

http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html

For example, Texas did not follow the ABA's lead and does not have an exception for client confidences in Rule 4.1. Note that the Texas Rule, however, requires a lawyer not to remain silent only if (a) there is a "material fact" involved, and (b) the lawyers' own conduct (as opposed to the clients' conduct) is at issue.

Texas Rule 4.1 states:

"In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client."

[65] *See*: Peter R. Jarvis and Trisha M. Rich, "The Law of Unintended Consequences: Whether and when Mandatory Disclosure under Model Rule 4.1(B) Trumps Discretionary Disclosure under Model Rule 1.6(B)," 44 Hofstra Law Rev. 421 (2015).

settlement amounts," and other matters as long as they do not constitute "fraud."[66] On the other hand, the comments to the ALI's Restatement of the Law Governing Lawyers questions whether "puffing" can ever be a non-material fact and states that "a lawyer proceeds at considerable risk in relying on a defense that a misrepresentation was mere immaterial puffery."[67]

Truth is not the stated objective of the Model Rules. In negotiations, a lawyer is entitled (but never required) to reveal client confidences if making a disclosure "facilitates a satisfactory solution." Facilitation of a satisfactory solution is not necessarily one that is equitable to both sides. There is no requirement to reveal a

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[66] The ABA Official Comment to Rule 4.1 entitled "Statements of Fact," reads:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intention as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

[67] See the comments to the ALI Restatement of the Law Governing Lawyers §98 (emphasis supplied)::

> *The exception under the law of misrepresentation for "puffing" statements has been variously defined and is uncertain in scope.* See generally Restatement Third, Unfair Competition § 3, and Comment d, and Reporter's Note thereto. The definition of warranty in the Uniform Commercial Code is arguably the broadest. It seems to extend to any statement of value or other opinion of the seller. See *id*. § 213(2) ("an affirmation merely of the value of goods or a statement purporting to be merely the seller's opinion or commendation ... does not create a warranty."). See also Restatement Second, Contracts § 168. But cf. Restatement Second, Torts § 538A ("A representation is one of opinion if it expresses only ... (b) [the maker's] judgment as to quality, value, authenticity, or other matters of judgment."). See also Restatement Second, Agency § 348, Comment d ("sellers' talk" by agent permitted to same extent as would be permitted to principal). Misstatements of opinion are generally not actionable, unless the third person's reliance on the opinion was based on a reasonable belief that the representing lawyer had special skill, judgment, or objectivity on the subject of the opinion, or when the auditor was particularly susceptible to being overreached through such a misrepresentation. See Restatement Second, Contracts § 169; Restatement Second, Torts §§ 542-543.

Cf. ABA Model Rules of Professional Conduct, Rule 4.1, Comment ¶ [2] (1983) (emphasis supplied):

> This rule refers to statements of fact. *Whether a particular statement should be regarded as one of fact can depend on the circumstances.* Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

The ABA Model Rule commentary somewhat shifts its ground. The doctrine of tort and contract does not support its apparent initial position that puffery does not amount to a statement of "fact." The later indication in the Comment that such statements may not reasonably be relied on by listeners as "material" better states existing law. Nonetheless, a lawyer proceeds at considerable risk in relying on a defense that a misrepresentation was mere immaterial puffery. *E.g.*, *Sainsbury v. Pennsylvania Greyhound Lines*, 183 F.2d 548 (4th Cir.1950) (lawyer's false statement in negotiating with lay person that government employees could not recover medical expenses held actionable); *Jeska v. Mulhall*, 693 P.2d 1335 (Or.Ct.App.1985) (statement of lawyer for seller that buyer was getting "a lot of property for the money" held actionable fraud where lawyer knew that client could not convey title); cf. Lundin v. Shimanski, 368 N.W.2d 676 (Wis.1985) (real-estate agent liable for fraud where agent misled buyer about ease of getting city permit for buyer's planned use).

confidence in order to reveal the truth. The Rule contains a clear demarcation; conduct that is "fraudulent" is forbidden, but all else is merely part of negotiating strategy.

In light of Rule 4.1, other language of the Rules, such as that in Rule 2.1 allowing (but not mandating) lawyers to consider moral issues, may seem to some to ring somewhat hollow.[68]

Rule 4.1, relating to *negotiation,* sharply contrasts with the rules regulating conduct before a tribunal. For example, while Model Rule 4.1(a) states that a lawyer "shall not knowingly make a false statement of *material* fact or law . . .", Model Rule 3.3(a)(1) (concerning candor to a tribunal) states that a lawyer shall not "make a false *statement of fact* or law to a tribunal." Moreover, in an ex parte proceeding, Model Rule 3.3(c)[69] requires the attorney to "inform the tribunal of all *material facts* known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." Note that Rule 3.3(a)(1) prohibits false affirmative statements of fact, whether or not they are material, while Rule 3.3(c) prohibits remaining silent in ex parte proceedings about "material" facts. In other words, while lawyers in negotiations can quibble about whether what they've said is a false statement of something that is material or immaterial, when one appears before a tribunal, an attorney may never knowingly make a false statement of any fact, whether material or not.

[68]Model Rule 2.1 provides:

> Rule 2.1 and Comment as Adopted
>
> Rule 2.1 Advisor
>
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer ***may*** refer not only to law but to other considerations such as ***moral***, economic, social and political factors that may be relevant to the client's situation. (emphasis supplied).

[69] New Hampshire deliberately reversed the order of 3.3(c) and 3.3(d) but did not change the text of those rules. The New Hampshire Supreme Court order instituting these changes stated:

"New Hampshire's Rule reverses the order of ABA Model Rules (c) and (d). This clarifies that a lawyer's disclosure obligation during an ex parte proceeding applies even if the information provided to the tribunal would otherwise be protected by Rule 1.6."

When the current Model Rules were being drafted, there was an attempt in the ABA to subordinate the lawyer's duty of candor to the court to the rules relating to privilege. The amendments were defeated because as the discussion notes, "the duty of candor *toward the court* was regarded as paramount."[70]

What kind of candor is required in negotiations? The ABA Comment to Rule 4.1 specifically allows statements about "a party's intention as to an acceptable settlement of a claim" to be exempted from the rule prohibiting false statements of "material fact"; apparently you can lie with impunity about your settlement authority. There is, however, no such exemption in the comments to Rule 3.3 concerning candor to the tribunal, and probably for good reason. A lawyer who, during a settlement conference with a judge, misstates the client's intention as to an acceptable settlement undoubtedly acts at his or her peril. While there is a special rule (3.4) relating to "fairness to opposing party and counsel," it seems solely directed at trial procedure.

The limited rules relating to negotiations, as opposed to the broader and more detailed rules relating to litigation, have been the subject of much commentary. In her famous Law Review Article, "Bargaining and the Ethics of Process," Professor Norton noted:

> The Model Rules do not exempt negotiation from ethical constraints, but neither are the rules drafted to address the demands of bargaining with the same specificity that they address the demands of litigation. No rule or law requires fairness during negotiation . . . * * * [In] negotiation, where there is only the sparsest written guidance, the parties must decide for themselves what is legal, what is factual, and what is ethical.[71]

Professor Bok, in her book, *Lying*, has a similar caveat:

[70] ABA House of Delegates 2002 Legislative History, p. 122. (emphasis supplied).

[71] Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U. L.Rev. 493, 529 (1989).

> "But codes of ethics function all too often as shields; their abstraction allows many to adhere to them while continuing their ordinary practices. In business as well as in those professions that have already developed codes, much more is needed. The codes must be but the starting point for a broad inquiry into the ethical quandaries encountered at work. Lay persons, and especially those affected by the professional practices, such as customers or patients, must be included in these efforts, and must sit on regulatory commissions. Methods of disciplining those who infringe the guidelines must be given teeth and enforced."[72]

8. ETHICS, PROFESSIONALISM, AND NEGOTIATION TACTICS

Applying concepts of "ethics" and "professionalism" is not merely a matter of litigation tactics, where "hardball" antics are a matter of record, either in depositions or in trial. A tension in negotiations always exists among (a) achieving the client's desires, (b) determining what information to reveal that advances the client's interests, (c) what information to conceal to either advance or protect the client's interest, and (d) whether one's own moral code, concern for one's reputation, or concern for society require the lawyer to withdraw rather than continuing to represent a client who persists in pursuing a course of action or a negotiation tactic which the lawyer finds morally repugnant.

At look at this tension in negotiations can be found in New Hampshire. While the New Hampshire Bar adopted ABA Model Rule 4.1 dealing with negotiations, which, as has been shown, condones misleading the other party, the New Hampshire Lawyer Professionalism Creed sets forth a different (but apparently unenforceable) set of goals, requiring a New Hampshire lawyer to "temper zealousness," to treat "one's word as one's bond," and to "not mislead" anyone.[73] The New Hampshire Professionalism Creed

[72] Sissela Bok, Lying: Moral Choice in Public and Private Life (Pantheon Books, 1978).

[73] *See* the New Hampshire Lawyer Professionalism Creed, Adopted April 4, 2001, and found at the following URL (last visited 1/21/15): https://www.nhbar.org/legal-links/nh-professionalism-creed.asp. The Creed states, in part (emphasis supplied):

requires honesty and forthrightness, making no distinction between statements before a court and those in non-court negotiations.

Discussions of what is and is not "ethical" during negotiations have consumed reams of paper with law review articles containing, in the aggregate, thousands of footnotes. On one side is the view that there are two precepts that should guide the lawyer's conduct in negotiations: (a) honesty and good faith, (b) a lawyer may not accept a result that is unconscionably unfair to the other party.[74] On the other end of the spectrum are those who argue that obtaining the best interest of the client is the proper overall goal and should be pursued vigorously in the absence of outright fraud.[75] Discussions of this view can be found in the writings of Professors James J. White[76] and Charles Curtis.[77] The tension, at base, is not necessarily between "ethics" as an abstract notion, but rather whether various negotiation tactics are permitted or prohibited by the Model Rules. One author declares, in an article about "real world" negotiations, that "I have never participated in a legal negotiation — as an advocate or mediator — where both sides did not lie, yet I have encountered almost no attorneys I thought were dishonest."[78]

FOURTH, a New Hampshire lawyer is reliable, responsible and committed. A New Hampshire lawyer: cares deeply about both the interests of the client and of the legal system; keeps promises, because ***one's word is one's bond***; ***tempers zealousness*** on behalf of the client with his or her role and responsibility as an officer of the court.

FIFTH, ***a New Hampshire lawyer is honest and forthright.*** Lack of candor impedes justice and degrades the profession, and lying has no place in the practice of law. A New Hampshire lawyer: ***displays candor with*** the client, the court and all others; does not mislead the client, the court ***or others***.

[74]What Professor Norton (p. 513) has termed the "universal" position is exemplified and was first expounded in a 1965 law review article by Judge Alvin B. Rubin, 35 La.L.Rev. 577, 589, *A Causerie on Lawyers' Ethics in Negotiation*.

[75] *See, e.g.*, Steven O. Weise, "Ethics in Negotiations: Puffing and Lies," SX034 ALI-CLE 105 (2016). and Barry R. Temkin, Misrepresentation by Omission in Settlement Negotiations: Should There Be a Safe Harbor?, 18 Georgetown Journal of Legal Ethics 179, 181 (2004)

[76] White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. RES.J. 926.

[77] Curtis, *The Ethics of Advocacy*, 4 Stanford L.Rev. 3 (1951). Professor Norton calls Professor Curtis's view "stark traditionalism," Norton at p. 513.

[78] *See* Charles B. Craver, "Negotiation Ethics for Real World Interactions," 25 Ohio St. J. On Disp. Resol. 299, 317 (2010), quoted in the first line of Andrew Hogan's article "The Naïve Negotiator: An Empirical Study of First-Year Law School Students' Truth-Telling Ethics," 26 Georgetown Journal of Legal Ethics 725 (2013).

The high regard with which negotiating tactics are viewed by some can be seen in titles of law review articles such as:

- "The Ethics of Lying in Negotiations"[79]
- "Negotiation Ethics: How to Be Deceptive Without Being Dishonest: How To be Assertive Without Being Offensive" [80]
- "Professionalism: Lip Service or Life Style"[81]
- "Ethics on the Table: Stretching the Truth in Negotiations"[82]
- "Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?"[83]
- "Ethical Considerations in Negotiation: When does Puff the Magic Dragon Go Lower than a Snake's Navel?"[84]
- "Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards For Negotiators and Mediation Advocates."[85]

Many of these articles contain a search for principles that should guide attorneys during negotiations. The fact that the authors of these articles have felt a need to develop criteria and to articulate them is indicative of the fact that the Model Code and the Model Rules are deficient in this regard. For example, one article starts with the statement: "If you are curious about ethical distinctions between guile, 'puffing, and damnable prevarication in the context of negotiations, ... read on."[86]

The tension is between being an effective negotiator and being truthful has been noted succinctly and clearly by Professor Wetlaufer:

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[79] Wetlaufer, "The Ethics of Lying in Negotiations," 76 Iowa L.Rev. 1219 (1990).

[80] Craver, 38 S. Tex. L. Rev. 713 (1997)

[81] Sowle, "Professionalism: Lip Service or Life Style," 59 Jan. Or. St. B. Bull. 33 (1999).

[82] Dahl, Ethics on the Table: Stretching the Truth in Negotiations, 8 Review of Litigation, 173 (1979).

[83] Hodes, Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better, 87 Ky. L. J. 1019 (1999).

[84] Philip K. Lyon, "Ethical Considerations in Negotiation: When does Puff the Magic Dragon Go Lower than a Snake's Navel?" 55 No. 1 Practical Lawyer 37 (2009).

[85] James K,.L. Lawrence, 29 Ohio State Journal on Dispute Resolution 35 (2014).

[86] William J. Wernz and David L. Sasseville: "Negotiation Ethics: Any Attorney Will Tell You that Negotiating Sessions are Fraught with Uncertainties, Posturing, and Various Gambits to Persuade the Other Side to Yield. Who is and Who Isn't at the Table, Who's Representing Whom, and How the Parties Behave are All Part of the Complex Dynamic, But All Transpires in the Framework of the Rules of Professional Conduct," 66- Bench & B. (Minnesota) 22 (2009).

> Effectiveness in negotiations is central to the business of lawyering and a willingness to lie is central to one's effectiveness in negotiations. Within a wide range of circumstances, well-told lies are highly effective. Moreover, the temptation to lie is great not just because lies are effective, but also because the world in which most of us live is one that honors instrumental effectiveness above all other things. Most lawyers are paid not for their virtues but for the results they produce. Our clients, our partners and employees, and our families are all counting on us to deliver the goods. Accordingly and regrettably, lying is not the province of a few 'unethical lawyers' who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law.
>
> Our discomfort with that fact has, I believe, led us to create and embrace a discourse on the ethics of lying that is uncritical, self-justificatory and largely unpersuasive. Our motives in this seem reasonably clear. Put simply, we seek the best of both worlds. On the one hand, we would capture as much of the available surplus as we can. In doing so, we enrich our clients and ourselves. Further, we gain for ourselves a reputation for personal power and instrumental effectiveness. And we earn the right to say we can never be conned. At the same time, on the other hand, we assert our claims to a reputation for integrity and personal virtue, to the high status of a profession, and to the legitimacy of the system within which we live and work. Even Gorgias,[87] for all his power of rhetoric, could not convincingly assert both of these claims. Nor can we . . . . [88]

9. THE NOT SO SUBTLE ART OF MISDIRECTION

Whether the articulated standard is that lawyers "must use any legally available move or procedure helpful to a client's bargaining position,"[89] an "almost pathological

[87] Gorgias was a Greek philosopher (circa 485-380 BCE). Known for the power of his public speaking, he did not merely give perorations. Rather, he often invited questions from the audience and gave insightful replies. He conducted rhetoric classes and charged for many of his speeches.

[88] Wetlaufer, *Lying in Negotiations*, 75 Iowa L.Rev. at 1272.

[89] Robert J. Condlin, "Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role," 51 Maryland L.Rev. 1 (1992) uses this phrase, but the introduction to the article makes clear the author's viewpoint:

"There is a contradiction in the prevailing understanding of lawyer dispute bargaining role, between what might be thought of as bargaining's practical norms and its ethical norms. The practical norms provide rules for maximizing long range client and lawyer returns. They tell lawyer bargainers to distribute resources efficiently, preserve bargaining relationships, and satisfy party interests in the aggregate. The ethical norms provide rules for representing clients competently and diligently. They tell lawyers to get the most they can for present clients, when so instructed, irrespective of the effects on resource distribution and future bargaining. Trying scrupulously to comply with both sets of norms, each for different reasons, lawyers frequently find themselves under contradictory

pro-client attitude,"[90] "'total annihilation' of the other side,"[91] or other, less pejorative phrases, "effective" negotiation often means winning big, and this often involves, to use a kind euphemism, "misdirection." "Misdirection" can include either a true but incomplete statement of facts or silence, both of which are designed to lead the other party to an erroneous conclusion about the facts or your true position. The excuse for this behavior ("I didn't lie"), according to Professor Wetlaufer, can be categorized as follows:

> [L]awyers sometimes assert that whatever they did was not a lie. These claims are of at least five kinds:
>
> (1) 'I didn't lie because I didn't engage in the requisite act or omission';
>
> (2) 'I didn't *mean* to do anything that can be described as lying';
>
> (3) 'I didn't lie because what I said was, in some way, literally true';
>
> (4) 'I can't have lied because I was speaking on some subject about which there is no 'truth'; and
>
> (5) 'I didn't lie, I merely put matters in their best light.'[92]

Other categories where a "lie" or "mistruth" has been stated, according to Wetlaufer, fall into some of the following groups:

- I lied, if you insist on calling it that, but it was an omission of a kind that is presumed to be ethically permissible.
- I lied but it was legal.
- I lied but it was on an ethically permissible subject.
- I lied but it had little or no effect, because it was justified by the nature of the negotiations.

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commands, without meta norms to sort out the contradictions or rank order the commands, and thus, 'in the dark' with respect to the central question of how they should act. This contradictory set of role commands has several effects, but one of the least salutary is that it seems to encourage the stylized adversarial maneuvering commonly associated with lawyers and dispute bargaining (*e.g.*, exaggerated argument, insulting tone, routinized trading, circumspect and deceptive disclosure), which is now widely thought to make such bargaining inefficient, unpleasant, and unfair. If these effects are to be avoided, and bargaining role to be made more coherent, it is necessary that bargaining's ethical and practical norms be reconciled, or if that is too ambitious, at least their contradictions described in sufficient detail so that others may work on the problem."

[90] Lawry, "The Central Moral Tradition of Lawyering," 19 Hofstra L.Rev. 311, 330.

[91] Lawry, Central Moral Tradition at 331.

[92] Wetlaufer, "Lying in Negotiations*"* at 1237.

- I lied but it was justified by my relationship to the victim.

As Professor Wetlaufer has written:

> A lie about a negotiator's authority is told with the same purpose and with the same effect as a lie about the true mileage of a used car. The speaker's hope is that, by creating some belief at variance with her own, she will get a better deal than she could have gotten without having created that belief. The advantages she may hope to secure through these lies are every bit as tangible, every bit as great, and every bit as illegitimate as those she might hope to secure through lies on other subjects. So is the damage that will be caused.[93]

Whether one calls it "misdirection," "puffing," "bluffing," or some other term, there are many ancient discussions concerning whether absolute truthfulness is always desirable. The Greeks and Romans wrote much on this subject. Homer's *Iliad* states: "For hateful in my eyes, even as the gates of Hades, is that man who hides one thing in his mind but says another."[94] Aeschylus had Prometheus say: "The worst disease of all, I say, is fabricated speeches and disguise."[95]

Cicero, in his letters to his son, describes a system of moral rectitude.[96] He wrote about situations involving hard bargaining in business and sharp practices in the law. Among Cicero's examples was that of a merchant from Alexandria who brought a ship full of grain to Rhodes, which was in the midst of a famine. The merchant was aware that other traders were on their way from Alexandria with substantial cargoes of grain. The dilemma for the merchant farmer was whether he should tell the Rhodians this and get a lesser price, or say nothing and get a higher price. Cicero also posits the example of an

[93] Wetlaufer, "Lying in Negotiations" at 1242, 1243.
[94] Iliad, Chapter 9.
[95] Aeschylus, *Prometheus Bound*, Translation by Paul Roche, Mentor Classics (1962-1964).
[96] Cicero, *Selected Works*, Translated by Michael Grant, Penguin Books, Copyright (1960), page 177.

honest man who wants to sell a house knowing that it contains certain defects of which he alone is aware. Should the seller reveal the defects and perhaps not sell the house at all or for a lesser price, or should he conceal them?

Cicero points out, using Antipater and Diogenes as two poles of the argument, that one position is to take a moral view and reveal everything while the other is that one should do only what is commercially advantageous. Cicero's own view is that one should not conceal any defects:

> I believe, then, that the corn-merchant ought not to have concealed the facts from the Rhodians; and the man who was selling the house should not have withheld its defects from the purchaser. Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which you know would be useful for them to know. Anyone can see the sort of concealment that this amounts to - and the sort of person who practices it. He is the reverse of open, straight forward, fair and honest: he is a shifty, deep, artful, treacherous, malevolent, underhanded, sly, habitual rogue. Surely one does not derive advantage from earning all those names and many more besides.[97]

Cicero traces the requirement of honesty and fair dealings to the Twelve Tables, the earliest and most fundamental of Roman laws, circa 450 B.C., and to the Plaetorian law, circa 192 B.C. Pointing out that honesty and fair dealing are appropriate criteria, Cicero notes that "the laws in our Civil Code relating to real property stipulate that in a sale any defects known to the seller have to be declared." A suppression of facts not asked about was impermissible. Cicero writes that although the civil law does not rectify all moral wrongs, there is nobility in the aspirational goal that, "between honest men there must be honest dealing and no deception." [98]

[97] Cicero, *Selected Works*, Grant Translation, at 178-179.
[98] Cicero, *Selected Works*, Grant Translation, at 185.

Cicero then discusses what constitutes honest dealing. This Roman view of the law was adopted by the French in their Civil Code. [99]

Although civilian jurisdictions (such as Louisiana) have long since honored truth in negotiations, even enshrining these concepts in their Civil Codes, the common law took the opposite approach, postulating the rule of caveat emptor as opposed to the civilian concept of *caveat venditor*.[100]

In *Laidlaw v. Organ,* a famous common law case, Chief Justice Marshall rejected the concept of honesty and fair dealings when facts are "equally accessible to both parties."[101] The buyer, Organ, sought to compel delivery of tobacco that he had purchased. Laidlaw, the seller, claimed that he was deceived by Organ and did not have to deliver the tobacco. Laidlaw had asked whether Organ knew of anything that might affect the tobacco's value and Organ said nothing. In fact, Organ knew that the price of tobacco had risen steeply because the Treaty of Ghent had been signed, ending the War of 1812. Organ, the buyer, won because there was no obligation, said Justice Marshall, to speak. Remaining silent was permissible,[102] even though Organ knew that Laidlaw was under a misapprehension.[103]

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[99] R. Pothier, *Traite Du Contrait de Vente*, 2 OEUBRES de Pothier 106 (M.Dupin. Ed. 1823), translated by Professor Shael Herman in "The Louisiana Civil Code, A European Legacy for the United States," Louisiana Bar Foundation (1993) at 42.

[100] Common law precepts are not subject to universal approbation. Litigators who had the distinction of arguing a case before the late, esteemed Judge John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit, and who have attempted to wax eloquent about the majesty of the Anglo-Saxon common law, sometimes elicited a quick response from Judge Wisdom. He liked to paraphrase Disraeli's famous statement to Parliament. Judge Wisdom was wont to look down at counsel from the Bench and proclaim:

Counselor, when the Angles and Saxons were howling savages, painted blue and eking out an existence fishing on the fens of England, there was a civil law system of justice for more than 1,000 years on the Continent of Europe from which Louisiana derived its Civil Code.

[101] *Laidlaw v. Organ*, 15 U.S. (2 Wheaton) 178, 179 (1817).

[102] In fact, the brief of the buyer contended: "The maxim of *caveat emptor* could never have crept into the law if the province of ethics had been co-extensive with it." 2 Wheat at 193.

[103] In 1815, when the sale arose, the Louisiana Civil Code had its own rules on fair dealing. For a critique of the common-law view, see Professor Shael Herman's discussion in "The Louisiana Civil Code, A European Legacy for the United States," (Louisiana Bar Foundation 1993) at 42-43.

It is interesting to note that although the case arose out of a Louisiana sale, with the seller being in New Orleans, apparently the parties did not submit briefs to the Supreme Court on Louisiana civil law principles but rather briefed the case as if common law controlled.

A brief history of Louisiana law on this point may be helpful. The Louisiana Purchase occurred in 1803. In 1808, Louisiana adopted its first Civil Code, and in 1812 Louisiana became a state. For more on the history of the Louisiana Civil Code, see: A.N.

Another historic example can be found in the Talmud,[104] which admonishes one to refrain from all varieties of dealings which depend upon obtaining a false value for things, or placing a false value on things. It cautions one against taking advantage of the weakness of another, either by raising false hopes or by making tactless remarks.

It is this type of outcome, where sharp bargaining on behalf of one party obtains an advantage that would not otherwise be there but for the silence or for the misdirection, that leads to "the sense of injustice."[105] Professor Edmond Cahn's famous book by this title argues for a philosophy that restores a sense of justice and avoids a sense of injustice in the law. [106]

10. THIRD PARTY LIABILITY: BEING SUED BY SOMEONE OTHER THAN YOUR CLIENT

It used to be hornbook law that a lawyer could not be liable to non-clients because (a) the only cause of action against a lawyer was in malpractice, and (b) there could be no malpractice claim in the absence of a contractual relationship to the plaintiff. "The classic case of such a circumstance is *Spaulding v. Zimmerman,* 116 N.W. 2d 704 (Minn. 1962). In that case, the defendants' lawyers knew the plaintiff, Spaulding, to have an aneurysm, "a life-threatening condition of which Spaulding himself was unaware and which could

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Yiannopoulos, "The Civil Codes of Louisiana," printed as a forward to LOUISIANA CIVIL CODE, 2014 EDITION, VOL. I (Thompson Reuters Westlaw 2014).

[104] The Talmud, a 20-volume rabbinic exegesis on the Torah (the first five books of the Bible) dating from the third century, contains numerous comments and explanations of biblical language. Note: All the quotations and materials in this footnote are from *Studies in Shemot*, Book 2, by Nehama Leibowitz.

The Bible contains a rule of fair dealing in pricing. Leviticus 25:1-17 deals with the concept of the Sabbatical Year and the Jubilee Year. Every seventh year the soil was to be untilled (the Sabbatical Year). Every 50th year the land was to lie fallow and all landed property was to revert to the original owners. During 49 of the years the land could be leased or sold, but during the 50th year it returned to the original owner. Obviously, the closer one got to the Jubilee Year, the less valuable the rights of the possessor/buyer/lessee. Likewise, the further from the Jubilee Year, the more the owner could get for the land. Leviticus 25:14-17 specifically requires that the price reflect the fair value of the land in relation to the Jubilee Year. As Leibowitz notes:

[T]he Torah is not concerned with exclusively protecting the interests of the purchaser to save him from exploitation, or those of the vendor, who has been forced by his straitened circumstances to sell his ancestral field. But both parties are equally admonished to abide by the principles of justice and honesty, which alone should reign in the world and which should not be crowded out by man's selfish greed.

[105] Cahn, *The Sense of Injustice*, Indiana University Press (1964), Midland Book Edition.

[106] Cahn, *The Sense of Injustice*, Indiana University Press (1964), Midland Book Edition.

mean instant death unless treated with simple surgery. The lawyers concluded that their duty of confidentiality to their clients required that they keep the fact of the aneurysm confidential, and they did so, a move that came to light only when, two years later, Spaulding had an army physical that disclosed his condition. Spaulding then petitioned to have the original settlement vacated, and although the court granted his motion, it took great pains in so doing to emphasize that 'no canon of ethics or legal obligation' required the lawyers to inform Spaulding or his counsel about the aneurysm."[107]

The wall of privity, however, was eventually breached, first in will contests[108] and next in matters where lawyers had given opinion letters to third parties. In these circumstances, courts could see a written agreement and analogize that to some type of implied contractual relationship, or at least see that claims of "reliance" by the third party were not inappropriate.[109] One ethicist has described these third parties as " 'quasi-clients,' people to whom the lawyer owes a duty greater than that due strangers but secondary to that due to the client."[110]

Most of the cases impose liability under one of two theories: "(1) a multifactor balancing test (sometimes referred to as the 'relational approach'); or (2) a traditional third-party beneficiary contractual concept (sometimes referred to as the 'categorical approach')."[111] Regardless of the underlying theory used, courts time and time again have held that if a third party reasonably relies upon an attorney's opinion letter, then the

[107] Dolovich, *supra*, at n.22.

[108] *See* Nancy Lewis, *supra* at p. 805, and her discussion of the California decision in *Biakanja v. Irving*. For a more complete discussion of lawyer liability in will contests and the "intended beneficiary exception" to privity, see: D. Culver Smith, III, "Professional Liability of Lawyers in Florida: Theories of Liability," PLLF-FL-CLE 1-1, The Florida Bar, "Professional Liability of Lawyers in Florida" (2002).

[109] For a detailed discussion of these cases nationally, see: D. Culver Smith, III, *supra*.

[110] Nancy Lewis, *supra* at p. 827, quoting from G. Hazard, ETHICS IN THE PRACTICE OF LAW, p. 45 (1978).

[111] D. Culver Smith, III, *supra*.

attorney is liable to the third party, whether the basis of the liability is "negligent misrepresentation," "fraud," or some other type of innominate tort.[112]

Concerned with the expanding scope of liability, lawyers began creating voluntary standards that they hoped the courts would adopt in determining their liability to third parties. These were useful, however, only in transactional matters, where the potential for liability was typically to third parties who might rely upon a borrower's counsel opinion, and even in these instances, these voluntary standards have not proven as effective as their proponents had hoped.

On the other hand, the American Law Institute has two Restatements that directly relate to lawyer liability to third parties which apply in both litigation and transactional situations: the Restatement of the Law Governing Lawyers[113] and the Restatement of Torts.

The Restatement of the Law Governing Lawyers ("ALI Lawyers Restatement") contains a number of provisions that directly relate to third party liability. §56 states that a lawyer can be liable to a nonclient "when a nonlawyer would be [liable] in similar circumstances." The examples given under §56 include: a fraud claim against a lawyer who "knowingly helps a client deceive";[114] assisting a client commit a tort through acts which are themselves tortious;[115] a fraudulent misrepresentation that is something more

[112] See the cases collected by D. Culver Smith, *supra*, and in Steve McConnico and Robyn Bigelow, "Summary of Recent Developments in Texas Legal Malpractice Law," 33 St. Mary's L.J. 607 (2002).

[113] ALI Restatement of the Law Third, The Law Governing Lawyers (2000).

[114] ALI Lawyers Restatement §56, Comment c, p. 417.

[115] *Id*.

than "legally innocuous hyperbole";[116] as well as liability under federal securities laws, antitrust statutes, RICO, and consumer protection laws.[117]

The basis of this liability is the duty of care that lawyers owe to nonclients under §51 of the ALI Lawyer Restatement.[118] While some have criticized this standard as being too harsh on lawyers, because it does not look to whether the assistance to the nonclient is the sole (rather than simply one) of the primary purposes of the lawyer's actions,[119] it does attempt to create a fact-specific balancing test while at the same time apparently allowing lawyers to attempt to limit liability by contractual language. This has been termed the "contractarian" view of liability.[120] On the other hand, §51 applies only in three main contexts: liability in connection with a prospective client; liability in connection with a nonclient's reliance on a lawyer's opinion or advice given to a client; and lawyers as fiduciaries.

The comments to (but not the black letter of) §51 seem to acknowledge the possibility of contractual limitations on the scope of the duty and even indicate that the

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[116] ALI Lawyers Restatement §56, Comment f, p. 418. This comment begins:

> "Misrepresentation is not part of proper legal assistance . . ."

[117] *Id.*, Comments (i) and (j), pp. 419-420.

[118] Liability to a nonclient under The Law Governing Lawyer Restatement §51 states (emphasis supplied):

> For the purposes of liability under §48, a lawyer owes a duty to use care within the meaning of §52 ***in each of the following circumstances:*** * * *
>
> (2) to a nonclient when and to the extent that :
>
> (a) the lawyer . . . invites the nonclient to relies on the lawyer's opinion . . . and the client so relies;
>
> (b) the client is not, under applicable tort law, too remote from the lawyer to be entitled to protection; * * *
>
> (4) to a nonclient and to the extent that:
>
> (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
>
> (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter with in the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting in the breach;
>
> (c) the nonclient is not reasonably able to protect its rights; and
>
> (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

[119] "One commentator characterizes the Restatement approach as "unique and questionable." *See* D. Culver Smith, III, "Professional Liability of Lawyers in Florida: Theories of Liability," PLLF-FL-CLE 1-1 (2002), commenting on and quoting from Mallen & Smith, Legal Malpractice, §7.8 at 697-698 (West Group 5th ed. 2000).

[120] *See*, e.g., Richard W. Painter, "Rules Lawyers Play By," 76 N.Y.U. Law Rev. 665, 696 (2001).

duty is less if there is experienced counsel on the other side of the table.[121] There is no explanation, however, why Lawyer X's duties to a nonclient should diminish solely because of the presence or absence of Lawyer Y on the opposite end of the table, apparently leaving one with the possibilities that either (a) experienced counsel Y shouldn't or wouldn't let Lawyer X get away with something bad, or, if something bad did happen, then (b) the nonclient should sue its own counsel Y rather than the other side's Lawyer X. This apparent rationale, however, could be attacked by the argument that, if something bad did happen, then it would appear Lawyer Y really wasn't as experienced as the nonclient anticipated, meaning that Lawyer X's duties to the nonclient shouldn't be diminished.

Unlike the ABA's varied position on confidentiality in connection with the obligation to prevent financial loss, the ALI Lawyer Restatement §67 has always allowed a lawyer to disclose confidential information to "prevent, rectify, or mitigate"[122] a "substantial financial loss"[123] to a third person caused by a client crime or fraud even if the "loss has not yet occurred,"[124] but this can occur only if the "client has employed or is employing the lawyer's services in the matter in which the . . . fraud is committed."[125] Even if these criteria are met, §67 cautions that the attorney must first make a "good faith effort to persuade the client not to act"[126] if this is feasible. Alternatively, the attorney may ask the client to "warn the victim"[127] or fix the problem. §67 closes with the caution that a lawyer who either acts or fails to act under its principles is not "solely by reason of

[121] *See* ALI Restatement of the Law Governing Lawyers §51, Comment (e).
[122] ALI Lawyer Restatement §67(2).
[123] ALI Lawyer Restatement §67(1)(a).
[124] ALI Lawyer Restatement §67(1)(b).
[125] ALI Lawyer Restatement §67(1)(d).
[126] ALI Lawyer Restatement §67(3).
[127] Id.

such action or inaction"[128] liable in damages -- apparently it takes action or inaction plus something else.

Thus, both the ABA (under current Model Rule 1.6) and the ALI now hinge upon the lawyer's ability to disclose confidences that can result in substantial financial injury upon a "crime or fraud," and both allow disclosures to prevent reasonably certain death or substantial bodily harm. Some states, however, have adopted versions that substantially deviate from this provision of Model Rule 1.6.[129]

Yet, ALI Lawyer Restatement §66's black letter text[130] contains a number of additional restrictions on the lawyer before disclosure, including making "a good-faith effort to persuade the client not to act" and to ask the client to warn the victim if the action already has occurred. Some of the ALI "Illustrations"[131] to §66 attempt to provide guidance to the lawyer faced with a substantial bodily harm issue.

Concerning financial harm, the ALI Restatement has two Illustrations to §67 pertinent to litigators, whether they be construction law litigators or otherwise. These Illustrations attempt to draw a distinction between acts which already have occurred without the lawyer's previous involvement, and those where the lawyer's services had been employed in some way (even without the lawyer's knowledge at the time) in the furtherance of a crime or fraud.

There are also four Illustrations to §67 that are pertinent to transactional lawyers. Two Illustrations contend that a lawyer who was engaged, after the fact, to defend in a regulatory arena a claim that a client had defrauded a victim is not allowed to disclose the

[128] ALI Lawyer Restatement §67(4).

[129] Links to all the rules of the various state, resources about the rules, and a comparison of state changes to the Model Rules and Model Comments can be found on the site of the ABA's Center for Professional Development:
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

[130] ALI Lawyer Restatement §66 is entitled "Using or Disclosing information to Prevent Death or Serious Bodily Harm."

[131] The ALI Restatement contains "Illustrations" with explanations about the scope of each Section.

facts, for the lawyer was not "employed by the client in committing the fraud."[132] This nondisclosure is mandated even if there are penalties for continuing offenses.[133] Two other Illustrations allow a lawyer to disclose fraud in loan documents that the lawyer helped to prepare when the lawyer discovers the fraud after the fact, regardless of whether the loan has already closed.[134] These Illustrations, unlike the ABA Model Rules 1.6 and 4.1, recognize that a client cannot have a lawyer perform work that causes grievous financial losses and then expect the lawyer to remain silent, notwithstanding any expectations or rules of confidentiality.

While §67 states in a comment (but not in the black letter text) that these exceptions to confidentiality are "extraordinary," it appears that lawyers may not be able to use the Model Rules as a shield; courts may be looking to the ALI Lawyer Restatement as another basis to find liability.

The second basis used to impart nonclient liability to lawyers is §552 of the ALI Restatement (Second) of Torts, which concerns justifiable reliance on the advice of a professional. §552 has been used by courts in addressing lawyers' liability to those other than their clients.[135]

11. NON-LITIGATION NEGOTIATIONS AND LIABILITY TO THIRD PARTIES

Although the vast bulk of negotiations takes place outside of a litigation context, the rules (if any) that regulate negotiations are determined primarily by judicial decisions that, of necessity, occur after litigation. There are few reported ABA advisory opinions

[132] ALI Lawyer Restatement §67, Illustration 3.

[133] *Id.*, Illustration 4.

[134] *Id*, Illustrations 5 and 6.

[135] See, e.g., First National Bank of Durant v. Trans Terra Corporation International, 142 F.3d 802 (5th Cir. 1999); and McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (S.Ct. Tex. 1999).

on the ethics of non-litigation negotiations.[136] The American Law Institute has completed the Restatement of Law Governing Lawyers. The Restatement goes beyond the Model Code and the Model Rules in some respects and allows for discipline in negotiations even though the conduct may not be civilly actionable, but "puffing" is still allowed.

When it comes time for a court to rule on the limits of ethical behavior of lawyers, the court's view often may be colored by the separate statutory and jurisprudentially evolved standards that control an attorney's duty to the court and to the judge. In making such rulings, however, seldom do courts explicitly discuss the differences between the professional rules that relate to negotiations as opposed to court-related principles.

Analogies to the need to have truthful, fair dealing can be found in securities litigation. There, a separate body of law regulates what are "material facts" and "material omissions." Professionals can be "aiders and abettors" in securities fraud cases.

Even in the securities field, where the liability is statutory, courts have differing views on whether obligations to the public outweigh obligations to clients or to a corporation. A famous example is the *Dirks* case.[137] The federal court of appeals had held that Dirks, a respected financial analyst, was properly disciplined for failing to disclose to both the S.E.C. and the public information concerning a company's creation of false policies and records. The fact that the financial analyst attempted to get the Wall Street Journal to publish a story about the issue did not cleanse the failure to disclose the information to the S.E.C. or the public.[138] Reversing the appellate court decision, the

[136] *See*, ABA Inf. Opinion 86-1518 (1986). For a state opinion, see N.Y. County Lawyers' Association Committee on Professional Ethics Op. No. 686 (1991) on the responsibilities of a lawyer who discovers that his client may have given materially inaccurate information to the other side; cited in Tentative ALI Draft #9, Restatement of Law Governing Lawyers.

[137] *Dirks v. Securities and Exchange Commission*, 681 F.2d 824 (D.C.Cir. 1982), reversed *sub nom. Dirks v. S.E.C.*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983).

[138] "Dirks also acted knowingly when he passed on his information to clients before going to the SEC, in violation of his duty to the public and the SEC and in violation of his informants' disclose-or-refrain obligations. Therefore, it is not precisely relevant whether Dirks subjectively "knew" that his clients would trade. He knowingly took improper actions and put parties who were reasonably

Supreme Court held that Dirks (as a tippee of a tippee) had no duty to disclose. Because there was no breach of duty to shareholders by insiders, "there was no derivative breach by Dirks."[139] The dissent would have found Dirks liable, claiming that an inquiry into motives was not necessary.[140] Although the motives may have been "laudable, the means he chose were not. * * * As a citizen, Dirks had at least an *ethical obligation* to report the information to the proper authorities."[141] If the courts have difficulty in delineating ethical duties in the highly regulated securities field, then it is not unusual that the regulation of ethics in general negotiations is said by some to be even more troublesome.

One commentator has even asserted that lawyers can "misrepresent" some issues with impunity, claiming that a lawyer may "embellish the pain experienced by their client, so long as their exaggerations do not transcend the bounds of expected propriety"[142] and may "misrepresent the value their client places on particular items."[143]

There are few cases dealing with negotiations in non-litigation transactions. Most involve alleged fraud by a seller or lender and the lawyer's liability, particularly if there was but one lawyer handling all aspects of the closing for the lender, buyer, and seller.[144] These cases usually involve claims of self-dealing or mixed representation.[145]

12. A LOOK AT SOME FAMILY LAW NEGOTIATIONS

While family law transactions are not the usual realm of transactional lawyers, events that transpire in these proceedings can be instructive when one looks at how courts

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likely to trade without disclosure in a position to do so. * * * The record thus amply supports the SEC's finding that Dirks acted with requisite scienter for aiding or abetting liability under Rule 10b-5." 681 F.2d at 846.

[139] 463 U.S. at 667. 103 S.Ct. at 3268.

[140] Dissent of Justice Blackmun, joined by Justices Brennan and Marshall, 463 U.S. at 674, 103 S.Ct. at 3271.

[141] Emphasis supplied; 463 U.S. at 678, 103 S.Ct. at 3273.

[142] Craver, "Negotiation Ethics: How to be Deceptive Without Being Dishonest: How to be Assertive Without Being Offensive," 38 S. Tex. L. Rev. 713, 726 (1997).

[143] *Id*.

[144] See: Louisiana State Bar Association v. Klein, 538 So.2d 559 (La. 1989).

[145] *Cf*., *Baldasarre v. Butler* 132 N.J. 278, 625 A.2d 458 (1993). *Compare: Petrillo v. Bachenberg,* 263 N.J.Super. 472, 483, 623 A.2d 272 (App.Div.1993) (same), aff'd, 139 N.J. 472, 655 A.2d 1354 (1995).

deal with negotiation issues that seem not to violate the Rules of Professional Conduct or state or federal procedural rules but which nonetheless strike the court as unfair.

In one of the few reported cases involving pre-litigation negotiations that do not involve securities or a sale of property nor a writing by a lawyer who was alleged to have acted wrongfully is *Stare v. Tate*.[146] The case arose out of a property settlement in a divorce case. The wife's attorney, through a series of negotiations, offered a property settlement with a serious mistake in the valuation of the property; the mistake was to the wife's detriment. The husband's attorney was aware of the mistake and counter offered using the same mistaken valuation number. The counter offer was accepted by the wife's attorney and the instrument reflecting the counter offer was later approved by a court as a property settlement.

After the divorce became final, the former husband, apparently seeking to rub salt in the wound, sent the former wife a copy of the mistaken valuation with a notation on it, "Please note $100,000.00 mistake in your figures." After receiving the note the former wife filed suit to revoke the property settlement. The court allowed the property settlement to be revoked on the notion of unilateral mistake. Underlying the court's holding, although not explicit, is the implication that the former husband's attorney, who had knowledge of the mistake by making the counter offer, had the duty to inform his opposing counsel of the mistake in valuation.

Arguably the husband's lawyer's behavior did not fall within the prohibition of Rule 4.1, which only prohibits making a “false statement of material facts.” While the Comment to Rule 4.1 states that a misrepresentation can occur “if a lawyer incorporates or affirms a statement of another that the lawyer knows is false,” the valuation arguably

[146] 21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (Cal. App. 2d 1971).

was not false, simply mistakenly low. Would a bar association discipline the husband's lawyer in this instance? Would there be endless arguments whether the valuation was "false" and whether the husband's lawyer made a "statement" or merely remained silent. Was the statement "material?" Is this the type of problem that Justice Marshall would have no problem disposing of as in *Laidlaw v. Organ*, holding that the information is equally available to both sides?

13. SO, WHAT'S A LAWYER TO DO: NOSY LAWYER, NOISY WITHDRAWAL, OR NOISOME SILENCE?

Assume that you come upon a situation where you recognize the possibility of an action against you by a nonclient, such as fraud committed by your client while using your services, or information in documents you prepared that you subsequently come to learn is inaccurate or misleading. A serious dilemma is posed for cautious counsel.

a. What's The Rule, and Where Is It Found?

State rules vary broadly on a lawyer's obligation to disclose financial fraud on third parties (an item separate from tax evasion).

Another example can be found in Washington State's Rule 1.6 on disclosure if financial fraud is involved; it is broader than the ABA Model Rule.[147] As the Washington Comments to Rule 1.6 note, while the ABA "Model Rule permits a lawyer to reveal information relating to the representation to prevent the client from 'committing a crime . . . that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used the lawyer's

[147] Washington State's Model Rule 1.6(a)(3) states: "(3) ***may reveal*** information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services . . . ." (emphasis supplied).

services,' Washington's Rule permits the lawyer to reveal such information to prevent the commission of any crime."[148]

On the other hand, not every state goes as far as Washington State, and in those states, revealing information, even for serious client financial fraud, may expose the lawyer to potential adverse disciplinary action and a claim by the client whose confidences are revealed. On the other hand, not to reveal the fraud may expose the lawyer to litigation claims by the adverse party, particularly in light of the language of the ALI Lawyer Restatement §§ 51, 52, and 67.

Can the mere breach of professional rules be a basis of civil liability? The disciplinary rules expressly disclaim that they can be the basis of non-discipline liability.[149] ALI Lawyer Restatement §54(1) states that a "lawyer is not liable under §48 or §49 for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule."

The ABA Model Rule's Preamble states that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."[150] Many states have varied the ABA Preamble language. For example, Washington State has added additional provisions to its Preamble, including the statement that "[n]othing in these Rules is intended to change existing Washington law on the use of the Rules of Professional Conduct in a civil action.

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[148] Washington State Comment 20 to Rule 1.6

[149] See the comments to the Preamble to ABA Model Rule. The following excerpt shows changes from the former 1983 Model Rule:

> "~~[18]~~ 20. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. * * * The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. * * * ~~Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.~~ Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of a breach of the applicable standard of conduct."

[150] ABA Model Rule Preamble, Paragraph 20.

See *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992)."[151] The *Hizey* rule, in apparently prohibiting consideration of the Rules in civil cases, however, appears to be a minority position that other state and federal courts have not adopted.[152]

Then, there's the added problem of multi-state transactions, where the disciplinary rules of the various states differ and the status of state-adoption of the ABA Model Rule is not uniform. Which state rule controls is a difficult issue and a detailed discussion about this is beyond the scope of this paper.[153]

Once you have determined which rule applies and that you may be at risk, what are you to do? ABA Model Rule 1.16 ("Declining or Terminating Representation") suggests that one remedy for a lawyer is withdrawal, and the comments to ABA Model Rule 1.6 ("Confidentiality of Information") indicate that the withdrawal can be "noisy": *i.e.*, that you can signal to the opposing side something more than the mere fact of withdrawal by some indication that puts the opposing side on notice to investigate further, such as a disavowal of work product.[154] Similar "noisy" withdrawal inferences

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[151] *Hizey* stated that: a "breach of an ethics rule provides only a public, *e.g.,* disciplinary, remedy and not a private remedy." 830 P.2d at 259. *Hizey* also stated that Rules of Professional Conduct cannot "be used as evidence of malpractice" that "there are significant policy reasons for barring the use of a violation of the CPR or RPC as evidence of attorney malpractice," and that these rules "are ill-suited for use in the malpractice arena." *Id.* at 260.

[152] *See, e.g*., *Mainor v. Nault,* 120 Nev. 750, 101 P.3d 308, 321 (Nev. Nov 22, 2004): "We choose to adopt the majority rule, as it is the better reasoned rule. Because the Nevada Supreme Court Rules reflect a professional consensus of the standards of care below which an attorney's conduct should not fall, it would be illogical to exclude evidence of the professional rules in establishing the standard of care."

Also see: Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 472 S.E.2d 612 (S.C. Jul 01, 1996); and *CenTra, Inc. v. Estrin*, 538 F.3d 402, 410 (6th Cir.2008). "Although Rule 1.0(b) makes it clear that a plaintiff cannot seek damages for a violation of the Michigan Rules of Professional Conduct, a violation of the rules may be probative in establishing an independent cause of action. For instance, the Michigan Court of Appeals considered the Michigan Rules of Professional Conduct in a civil contract action that determined that a fee agreement was unenforceable. *Evans & Luptak, PLC v. Lizza*, 251 Mich.App. 187, 650 N.W.2d 364 (2002). The court in *Evans & Luptak* stated that although '[t]he rules do not ... give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule,' the rules are still admissible and relevant under 'the Michigan Rules of Evidence and other provisions of law. *Id*. at 368."

[153]For more on the choice of law issue, see: Arthur F. Greenbaum, "Multijurisdictional Practice and the Influence of Model Rules of Professional Conduct 5.5 -- An Interim Assessment," 43 Akron Law Review 729 (2010); Charles W. Wolfram, "What Needs Fixing? Expanding State Jurisdiction to Regulate Out-of-State Lawyers," 30 Hofstra L.Rev. 1015 (2002); Larry E. Ribstein, "Ethical Rules, Law Firm Structure and Choice of Law," 60 U. Cin. L. Rev. 1161 (2001); Harriet E. Miers, "Commission on Multijuridictional Practice," 11 No. 4 Prof. Lawyer 20 (2000); and H. Geoffrey Moulton, Jr., "Federalism and Choice of Law in the Regulation of Legal Ethics," 82 Minn. L. Rev. 73 (1997).

[154] For discussions of "noisy withdrawals," *see*: C.R. Bowles, Jr., "Noisy Withdrawals: Urban Bankruptcy Legend of Invaluable Ethical Tool?" 20 Oct. Am. Bankr. Inst. J. 26 (2001); Daniel Pope and Helen Whatley Pope, "Ethics and Professionalism: Rule 1.6 and the Noisy Withdrawal," 63 Def. Couns. J. 543 (1996); Michael R. Klein and Alan J. Otsfield, "Noisy Withdrawal," 868 PLI/Corp. 529, Practising Law Institute Corporate Law and Practice Handbook Series, 26th Annual Institute on Securities Regulation, Nov. 1994.

can be drawn from the ABA Comments to Model Rule 1.2.[155] ABA Formal Opinion 92-366 attempted to illustrate the problem and provide a solution, but the ABA Committee's split 5-3 vote on the resolution did little to provide reassurance that the rules are clear.[156]

On the one hand, the ABA comments to Rule 3.3 appear to validate "noisy" withdrawal in certain instances.[157] On the other hand, there are states (like Texas) whose rules contain no information or indication that the withdrawal, even if allowed, can be "noisy."[158]

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[155] Comment 10 to ABA Model Rule 1.2 states "In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like."

[156] *See*: Pope and Pope, *supra*, 63 Def. Counsel J. 543 at 544.

[157] The ABA Comment to Rule 3.3 states, in part: "[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. See also Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation as permitted by Rule 1.6."

[158] See Texas Rule 1.15: Rule 1.15 Declining or Terminating Representation

> (a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if:
>
> (1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;
>
> (2) the lawyer's physical, mental or psychological condition materially impairs the lawyers fitness to represent the client; or
>
> (3) the lawyer is discharged, with or without good cause.
>
> (b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client
>
> unless:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;
>
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.
>
> (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

The Texas Comment to this Rule states, in part:

> Optional Withdrawal
>
> 7. Paragraph (b) supplements paragraph (a) by permitting a lawyer to withdraw from representation in some certain additional circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect

If you want to make a noisy withdrawal, whom do you tell? Assuming that you won't get into trouble with the client (who may sue you for breaching a confidence), and assuming that you need to say something, what do you say and to whom? There are a number of law review articles that attempt to address these issues.[159]

A look at New Hampshire illustrates the issue. With the exception of a new paragraph (e),[160] unique to New Hampshire, the New Hampshire version of Rule 1.16 appears to track the ABA Model Rule. ABA Model Rule 1.16 allows an attorney to withdraw if the withdrawal can be accomplished without "material adverse effect on the interests of the client."[161] A noisy withdrawal, however, is clearly designed to alert somebody that something is afoot, so it can be anticipated that there will be an adverse effect on the client.

ABA Model Rule 1.16 also allows a withdrawal if the client is persisting "in a course of action involving the lawyer's services that the lawyer has reason to believe is

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> on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. A lawyer is not required to discontinue the representation until the lawyer knows the conduct will be illegal or in violation of these rules, at which point the lawyer's withdrawal is mandated by paragraph (a)(l). Withdrawal is also permitted if the lawyer's services were misused in the past. The lawyer also may withdraw where the client insists on pursuing a repugnant or imprudent objective or one with which the lawyer has fundamental disagreement. A lawyer may withdraw if the client refuses, after being duly warned, to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.
>
> 8. Withdrawal permitted by paragraph (b)(2) through (7) is optional with the lawyer even though the withdrawal may have a material adverse effect upon the interests of the client.

[159] *See*, for example: C.R. "Chip" Bowles, Jr., "Noisy Withdrawals: Urban Bankruptcy Legend or Invaluable Ethical Tool," 20-OCT Am. Bankr. Inst. J. 26 (2001); Todd John Canni, "Protecting the Perception of the Public Markets: At What Cost? The Effects of "Noisy Withdrawal" on the Long Standing Attorney-Corporate Client Relationship," 17 St. Thomas L. Rev. 371 (2004); Ryan Morrison, "Turn Up the Volume: The Need For "Noisy Withdrawal" In A Post Enron Society," 92 Ky. L.J. 279 (2004); Alec Rothrock, "Repugnant Objectives," 41 Dec. Colo. Law. 51 (2012); Steven L. Schwarcz, "Lawyers in the Shadows: The Transactional Lawyer in a World of Shadow Banking," 63 Am. U.L. Rev. 157 (2013); and Dennis J. Ventry, Jr., "Stiches for Snitches: Lawyers as Whistleblowers," 50 U.C. Davis L. Rev. 1455 (2017);

[160] New Hampshire Rule 1.16(e) states:

> (e) The representation of a lawyer having entered a limited appearance as authorized by the tribunal under a limited representation agreement under Rule 1.2(f)(1), shall terminate upon completion of the agreed representation, without the necessity of leave of court, upon providing notice of completion of the limited representation to the court.

[161] ABA Model Rule Model Rule 1.16(b)(1). Also see ABA Model Rule Model Rule 1.16(d): "d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

criminal or fraudulent,"[162] if "the client has used the lawyer's services to perpetrate a crime or fraud,"[163] or if the client insists upon "taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,"[164] or when "other good cause of withdrawal exists."[165] It is important to note, however, that the withdrawal under ABA Model Rule 1.16 is never mandatory; it is always discretionary.

Even ABA Model Rule 1.16, however, does not provide guidance on what you may say. While on the one hand it indicates, in *comments* only, that you may "withdraw or disaffirm any opinion, document, affirmation, or the like,"[166] nothing in the black letter law permits this in the context of fraud or financial harm (remember, the proposal that would have permitted this was defeated by a 63% vote). Thus, while you can withdraw because of client fraud (ABA Model Rule 1.16), the Model Rules do not let you reveal any confidential information (ABA Model Rule 1.6). Moreover, the comments, but not the black letter of ABA Model Rule 1.6, indicate that whether "other law" requires disclosure prohibited by ABA Model Rule 1.6 is "beyond the scope of these Rules."[167] This is not much help in determining whether judicial decisions that

[162] ABA Model Rule Model Rule 1.16(b)(2).

[163] ABA Model Rule Model Rule 1.16(b)(3).

[164] ABA Model Rule Model Rule 1.16(b)(4).

[165] ABA Model Rule Model Rule 1.16(b)(7).

[166] ABA Model Rule Model Rule 1.6, Comment 14. This comment states:

> "If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b)."

[167] This language is found in ABA Model Rule Model Rule 1.6, Comment 10, which reads:

> "Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law."

allow nonclients to sue for fraud, negligent misrepresentation, or silence are "law" that can trump the duty of confidentiality.

Thus, trying to do a noisy withdrawal in states that adopt the ABA Model Rules intact may be as difficult as Odysseus' task of steering between Scylla and Charybdis.[168] No wonder that one commentator wrote, over three decades ago, that the trouble with Rule 1.6 and the noisy withdrawal comment "is that some fools may not understand that Rule 1.6 does not mean what it seems to mean."[169]

b. What's the Jurisprudence on Noisy Withdrawals?

The term "noisy" withdrawal is being used more frequently by the courts. In a decision rendered a quarter-of-a-century ago,[170] a lawyer withdrew from the representation of a business and informed some people, but not the investors in the company. She was unable to dismiss, at pleading stage, a claim by the investors that the lawyer should have engaged in a noisy withdrawal as to them.

While the facts are complex, in essence[171] the lawyer, Douglas was engaged to assist a person being investigated for selling unregistered securities. Douglas found out not only that there were material misrepresentations and omissions in the offering materials, but also that her client was a convicted felon. Douglas prepared rescission materials for the offering that only indicated the securities were unregistered; they did not reference the prior misrepresentations or the fact that the offeror was a felon. All the investors rejected rescission. Douglas also prepared an affidavit for the client that turned

[168] Scylla and Charybdis were the monsters of Greek legend between whom Odysseus had to steer in the Strait of Messina. Scylla, who ate several of Odysseus' seaman, was described by Homer as "a creature with twelve dangling feet, six long necks and grisly heads lined with a triple row of sharp teeth." See http://www.theoi.com/Pontios/Skylla.html (last visited 02/08/17). Charybdis, a daughter of Poseidon and Gaia, was turned into a monster by Zeus and lived in a cave opposite Scylla. See http://www.theoi.com/Pontios/Kharybdis.html (last visited 02/08/17).

[169] Geoffrey C. Hazard Jr., "Rectification of Client Fraud: Death and Revival of a Professional Norm," 33 Emory L.J. 271, 306 (1984), quoted by Pope and Pope, supra, 63 Def. Counsel J. at 543.

[170] Scholes v. Stone, McGuire and Benjamin, 786 F.Supp. 1385 (N.D. Ill.1992).

[171] For the purposes of this paper, the distinction between the two law firms involved here has not been kept sacrosanct, for the purpose of the discussion is to provide an illustration of potential allegations that might be made rather than an attempt to carefully parse the decision. Since the case was only at the pleading stage, no aspersions are intended (or should be implied) against the lawyers or the firms involved.

out to be false, an affidavit that the lawyer knew was being submitted to state officials investigating the stock transactions. When Douglas found out about problems with the affidavit, she notified some people, but not the plaintiffs. Further, while Douglas knew some things, at the same time the client was lying to her about a number of other matters.

Douglas ended up advising the client that, because of his criminal problems, the client could not be associated with the entity and to "distance himself"[172] from it. Douglas recommended a second law firm ("SMB") to assist in criminal defense matters for the client. The plaintiffs contended (although SMB denied it), that SMB was asked to also assist in corporate and securities matters. There were allegations in the complaint that SMB assisted Douglas in preparing the rescission documents that omitted reference to both the client's prior criminal history and the material misrepresentations in the offering materials.

Eventually, a new entity was formed and some of Douglas' other clients ended up as officers. When Douglas and her firm finally withdrew from representation, after finding out about further client deceit, they informed the independent officers to "disassociate themselves"[173] from the former client, but did not notify investors or regulators.

Douglas, her firm, and the second firm (SMB) were all sued by investors in the various entities. In refusing to dismiss the claims, the court noted:

- The law firm was not being sued for failing to "'tattle' on its client to third parties" but rather for being "an active participant in a fraudulent scheme."[174]

  Note that the allegations of the complaint were controlling here, given the procedural posture of the case. Apparently, if, as a factual matter, it was merely a question of refusing to "tattle," the court would not have found a cause of action.

[172] 786 F. Supp. at 1392.
[173] *Id*.
[174] 786 F. Supp. at 1395.

- The court concluded that the investors had alleged enough facts "to establish an attorney-client relationship"[175] and thus could state a claim for both malpractice and breach of fiduciary duty.

  Note that the allegations of the complaint of an attorney-client relationship kept the case alive, even though apparently the law firm thought it was representing the organizer and the entities, not the passive investors.

- Even if there was no attorney-client relationship with the investors, nonetheless there was a relationship that mandated disclosure to investors of the fraud – this, in essence, is the noisy withdrawal assertion:

  > ". . . SMB as lawyers for the . . . entities owed a duty to the plaintiff investors to disclose [the client's] fraudulent conduct with respect to the . . . entities. As there was no express contract between SMB and the plaintiff investors, it logically follows that the duty was extracontractual."[176] This relationship also allowed a breach of fiduciary claim to be brought.

- The fact that the misrepresentations were made not by the lawyers but by the clients did not prevent the suit from going forward. While the lawyer corrected some things in some transmittals to some people, there was no notice to the investors, and regardless of whether the statements to the investors came from the client or from documents that the lawyers had a hand in drafting for the client to send, the lawyers "had a duty to inform."[177]

- The fact that no reliance was alleged by the plaintiffs was not a bar to the suit going forward, for given that there were allegations the law firm had "omitted material facts and that they had participated in the fraud * * * it is unnecessary to allege reliance by the class plaintiffs."[178]

- SMB's motion for sanctions against the plaintiffs, on the grounds that SMB was only criminal counsel for the individual client and did not represent the entities, was denied, for the allegations 'are not so baseless, specious, or off the mark as to warrant the imposition of sanctions * * * [P]laintiffs have raised issues which relate to the very fluid and evolving areas of the law. Plaintiffs' complaint is not so tenuous as to warrant the imposition of sanctions."[179]

[175] 786 F. Supp. at 1396.
[176] 786 F. Supp. at 1398.
[177] 786 F. Supp. at 1400.
[178] 786 F. Supp. at 1401.
[179] 786 F. Supp. at 1402.

As can be seen, broad ranging allegations in the case were enough to keep a lawyer and two separate law firms in a case where investors made claims against those representing a business and its organizer.

14. CONFLICTS OF INTEREST

Whether one looks at the current ABA Model Rules or the 1983 Model Rules the basic parameters of conflicts of interest are relatively similar. Lawyers cannot represent opposite sides in the same matter. Lawyers can represent others against former clients under certain restrictions, generally related to client confidences and whether the underlying facts are similar to the previous representation. A lawyer's personal interests may result in disqualification, and a lawyer's family relationship with a lawyer on the other side of the table may also result in disqualification. Various imputation of knowledge rules apply to law firms; some matters "infect" the entire law firm so that no one in the firm can take on the representation, while other matters can be quarantined so that the "infected lawyer" does not prevent the rest of the firm from handling the matter. A conflict may even arise in the absence of an express lawyer-client relationship (such as when a lawyer participates in a "beauty pageant" for selection of counsel, the discussion at the selection process discloses confidences, but the lawyer is not chosen by the prospective client). The 2012 amendments to ABA Rule 1.18 attempt to deal with this issue.[180]

[180] The 2012 ABA amendments to Model Rule 1.18 state (changes noted):

> Rule 1.18: Duties to Prospective Client
>
> (a) A person who discusses ***consults*** with a lawyer ***about*** the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who ~~has had discussions with~~ ***learned information from*** a prospective client shall not use or reveal that information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from

All of these areas break down into three main topics: (a) those conflicts that cannot be waived under any circumstance; (b) those conflicts that can be waived; and (c) things that might be perceived to be conflicts but are not. On those conflicts that can be waived, the ABA Model Rule requires some waivers to be "confirmed in writing"[181] (*i.e.* the lawyer sends the letter explaining what has been agreed to orally), as long as the client has given "informed consent," which is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risk of and reasonably available alternatives to the proposed course of conduct."[182]

There are literally hundreds of law review articles and publications on conflicts of interest. Some of the more recent ones that are worth taking a look at are set forth below

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representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Also see revised Comment (3) to this revised Rule. The Revised Comment states:

> A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[181] "Confirmed is writing" is defined by ABA Model Rule 1.0(b):

> 'Confirmed in writing,' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

[182] ABA ABA Model Rule Model Rule 1.0(e).

in a footnote.[183] The first article one might look at, however, is one written by the Reporter for the ALI Lawyer Restatement, Professor Charles W. Wolfram, "Ethics 2000 And Conflicts Of Interest: The More Things Change" 70 Tenn. L. Rev. 27 (2002), which contains a broad overview of how the ABA Model Rules continued and, in some cases, altered the conflict of interest rules.

15. CONCLUSION

Should we consider ourselves "ethical" lawyers because we have not directly violated the Model Rules, the Rules of Professional Conduct where we're licensed, or those states' codes "of professionalism" or "civility"? Should we be surprised when the public looks askance at lawyers and questions their ethics when the core Rules permit misdirection, bluffing, and even lying (on all "non-material" issues) in furtherance of the client's interest? Should we anticipate that courts may find ways to impose liability on lawyers to those who are not their clients, even if there is extensive limitation language in opinion letters or even in the absence of any written opinion to the third party?

There is an inherent tension between the duty to represent a client and the duty to the profession. There is a practical tension in wanting to get the best deal possible for your side and the duty of ethical fair dealing. There is a discernable difference between conduct that is permitted outside of litigation as compared to conduct that can be sanctioned for lawyers during litigation. The fact that the Bar has failed to adopt the same

[183] *See, e.g.*: Susan P. Shapiro, "Bushwhacking The Ethical High Road: Conflict of Interest in the Practice of Law and Real Life," 28 Law & Soc. Inquiry 87 (2003); Susan P. Shapiro, "If It Ain't Broke . . . An Empirical Perspective on Ethics 2000, Screening, and the Conflict-Of-Interest Rules," 2003 U. Ill. L. Rev. 1299; Amanda Kay Morgan "Screening Out Conflict-Of-Interests Issues Involving Former Clients: Effectuating Client Choice and Lawyer Autonomy While Protecting Client Confidences," 28 J. Legal Prof. 197 (2004); and Alexander W. Jones, "Defenses To Disqualification: Fact Situations That Allow An Attorney To Avoid Disqualification For A Conflict Of Interest," 27 J. Legal Prof. 195 (2003).

An article that examines how law firm compensation systems could affect the creation of conflicts of interest is Edward, A. Bernstein, "Structural Conflicts Of Interest: How A Law Firm's Compensation System Affects Its Ability To Serve Clients," 2003 U. Ill. L. Rev. 1261

rules for non-litigation and litigation negotiations does not make the difference in standards one of which we should be proud.

It can be anticipated that since most Bar Associations appear to have brought few actions to police the ethics of negotiations, it may be that a set of jurisprudential rules may develop and that courts may look to the ALI Restatement rather than the Rules for guidance.

We should strive to equate professionalism *with* ethics; the entire goal of law as an honorable profession is to have a higher standard than exists in the marketplace. Two quotes illustrate this proposition. The first is from a case from Michigan:

> Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate. 571 F.Supp. 507, 512.[184]

The other is from a seminal article on legal ethics:

> If he is a professional and not merely a hired, albeit skilled hand, the lawyer is not free to do anything his client might do in the same circumstances. The corollary of that proposition does set a minimum standard: the lawyer must be at least as candid and honest as his client would be required to be. The agent of the client, that is, his attorney-at-law, must not perpetrate the kind of fraud or deception that would vitiate a bargain if practiced by his principal. Beyond that, the profession should embrace an affirmative ethical standard for attorneys' professional relationships with courts, other lawyers and the public: *The lawyer must act honestly and in good faith.* Another lawyer, or a layman, who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar. It is inherent in the concept of an ethic, as a principle of good conduct, that it is morally binding on the conscience of the

[184] *Virzi v. Grand Trunk Warehouse and Cold Storage Co.,* 571 F.Supp. 507 (E.D. Michigan 1983). See also, *Spaulding v. Zimmerman,* 263 Minn. 346, 116 N.W.2d 704 (1962); *Newman v. Fjelstad,* 271 Minn. 514, 137 N.W.2d 181 (1965); *Simons v. Shiek's, Inc.,* 275 Minn. 132, 145 N.W.2d 548 (1966); *Toledo Bar Ass'n v. Fell,* 51 Ohio St. 2d 33, 364 N.E.2d 872 (1977).

> professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule. Good conduct exacts more than mere convenience. It is not sufficient to call on personal self-interest; this is the standard created by the thesis that the same adversary met today may be faced again tomorrow, and one had best not prejudice that future engagement.[185]

Lawyers should stand apart not merely by their training but by their behavior and the mutual philosophical principles to which they hold one another. One day we may look back upon the current trend of distinguishing "ethics" and "professionalism" as perhaps being counterproductive. We may one day think that to call Model Rules exemplars of "ethics" is to denigrate ethics, and that to distinguish "ethics" from "professionalism" is confusing at best.

We should strive for the day when all who bear the title of "lawyer" are seen as ethical professionals.

One may not agree with those who contend that the ethical basis of negotiations (or any extra-tribunal actions) should be one of truth and fair dealing or that, as professionals, lawyers should "not accept a result that is unconscionably unfair to the other party."[186] Yet, it would be hard to argue with a more practical formulation, given the serious possibility that a single standard will ultimately evolve jurisprudentially:

> ***If you wouldn't do something in a courtroom context, if you wouldn't make a misleading statement in a settlement conference with a judge, and if you wouldn't remain silent about a misstatement made by your client or partner during discussions in court chambers or in open court, then you shouldn't do any of these things in non-litigation negotiations of any kind.***

[185] Judge Alvin B. Rubin, writing in 35 La.L.Rev. 577 at 589 (1972), *A Causerie on Lawyers' Ethics in Negotiation*.
[186] *Id*. 35 Louisiana Law Rev. at pg. 591.