Lawyers, including in-house lawyers, are expected to represent their clients zealously. And lawyers have a duty to maintain their clients’ confidences. But, when dealing with third parties, lawyers are prohibited from making false statements of fact and, under certain circumstances, from failing to disclose material facts. How can lawyers negotiate effectively if they have to tell the truth? Do they have to tell the whole truth and nothing but the truth? How will their clients react if they do? These thorny ethical issues often lack clear answers.

Lawyers’ conduct is governed by the local jurisdiction’s ethical rules. Many states have adopted a version of the American Bar Association’s Model Rules of Professional Conduct (“Model Rules”). Lawyers should look to their own state’s rules to determine what conduct is permissible. In 2002, the ABA’s Section of Litigation issued Ethical Guidelines for Settlement Negotiations (“ABA Guidelines”). The ABA Guidelines are intended to be an informal “guide for lawyers who seek advice on ethical issues arising in settlement negotiations,” not a formal set of rules or mandates.¹

I. When is a lie not a lie?

The Model Rules state that a lawyer shall not in the course of representing a client knowingly “make a false statement of material fact or law to a third person.” Model Rule 4.1. The Restatement of the Law Governing Lawyers provides that a lawyer communicating with a non-client may not “knowingly make a false statement of material fact or law to the non-client.” Misrepresentations can lead not only to attorney discipline, but can also cause settlement agreements to be vacated or lead to civil or criminal convictions for fraud.

So lawyers may not ethically lie. But lawyers lie all the time, particularly in settlement negotiations. Indeed, according to one legal commentator, “[t]o conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation.” ³

If lawyers can’t lie, must they disclose their client’s bottom line, reveal weaknesses, and forfeit their leverage in negotiations? The answer is no.

The Model Rules recognize that puffery and misdirection are commonplace in negotiations. The comments to Rule 4.1 provide:

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¹ American Bar Ass’n Section of Litigation, Ethical Guidelines for Settlement Negotiations (2002). The Guidelines are available on the ABA website.
³ Gerald Wetlaufer, The Ethics of Negotiation, 75 Iowa L. Rev. 1219, 1220-21 (1990)
This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend upon 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 the transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

The ABA Guidelines state that:

> The prohibition against making false statements of material fact or law is intended to cover only representations of fact, and not statements of opinion or those that merely reflect the speaker’s state of mind. Whether a statement should be considered one of fact, as opposed to opinion, depends on the circumstances.

ABA Guidelines at 35.

The comments and guidelines recognize when a lawyer opens settlement negotiations by saying that her client won’t take less than X and the adversary says his client won’t pay more than Y, they are simply establishing parameters and neither side accepts the others’ position as a statement of fact. And when a lawyer negotiating a contract for sale says the business being sold is worth no more than $3.2 million, when she knows it has greater value to her client, she is not perceived as being untruthful. In other words, a lie is not a lie under circumstances where the accepted convention is to stretch the truth.

A lie is a prohibited misrepresentation when it goes beyond puffing and relates to a fact material to the transaction. For example, if a lawyer says her client has $200,000 in insurance coverage to cover a claim, knowing there is $1 million in coverage, the lawyer has violated the ethical rule. Similarly, a lawyer who agrees in settling a case to disclose the identity of a confidential informant has misrepresented a material fact if there is no informant.

II. When is a truthful statement a lie?

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If lawyers are prohibited from making false statements of fact to third parties, can they avoid ethical traps simply by not speaking at all on a particular subject? Not according to the Model Rules, which state:

A lawyer is required to be truthful when dealing with others on a client’s behalf. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

Rule 4.1, Comment 1.⁶

The Model Rules prohibit half truths. For example, in *Sheppard v. River Valley Fitness One, L.P.*,⁷ two different employees filed discrimination lawsuits against Fitness One. Fitness One filed counterclaims alleging that the employees conspired to fabricate their lawsuits. Fitness One settled with one of the employees, who agreed to the entry of a $50,000 consent judgment against him. But the settlement required him to pay only $100 and to provide testimony for the companion case against the other employee. After he obtained the testimony, First One’s attorney tried to use the consent judgment to his advantage in the other employee’s case. He advised the other employee’s counsel of the $50,000 judgment and said that given the “extensive evidence” marshaled in the other case, the litigation had only one possible outcome. He did not disclose that the true cost of the settlement was only $100. He demanded $50,000 to settle the case.

The opposing attorney moved to compel production of the settlement agreement and disclosed counsel’s tactics to the court. The court issued sanctions,⁸ finding that the attorney, inter alia, “intentionally misled the plaintiffs… to intimidate them into a $50,000 settlement.” The court reasoned:

It is evident … that Whittington wanted Sheppard to believe that the [other employee’s] case had settled for a payment of $50,000. True, Whittington did not say so explicitly. However, he managed to convey that impression anyway by selecting certain words and omitting certain details with studied precision.⁹

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⁶ The ABA Guidelines also state that a lawyer must refrain from making “a partially true but misleading statement that is equivalent to an affirmative false statement.” ABA Guidelines at 35.

⁷ 428 F.3d 1 (1st Cir. 2005).

⁸ In addition to monetary sanctions, the magistrate judge ordered the offending attorney to take at least 10 hours of CLE on professional conduct responsibility rules within three months. *Id.* at 5.

⁹ 428 F.3d at 10 (emphasis in original).
Although counsel’s words were literally true “if dissected and construed from a minimalist point of view,” the court found that they were meant to convey more. Having chosen to disclose the face dollar amount of the settlement, counsel’s failure to disclose the true value became a sanctionable misrepresentation.

III. When is silence or an omission a lie?

The Model Rules recognize that a lawyer generally has no ethical duty to make affirmative disclosures of fact when dealing with a non-client. But under certain circumstances, a lawyer’s silence or failure to speak may be unethical.

Under Model Rule 4.1(b) a lawyer “may not knowingly 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.”

10 The comments to the rule state, “Rule 4.1(b) requires a lawyer to disclose a material fact, including one that may be protected by the attorney-client privilege, when the disclosure is necessary to avoid the lawyer’s assistance in the client’s illegal or fraudulent act.”

The comments recognize that a client can prevent the disclosure by refraining from the wrongful conduct. If the client persists, the lawyer “usually can avoid assisting the client’s illegal or fraudulent act by withdrawing from the representation.” If withdrawal is not sufficient, Rule 4.1(b) “requires disclosure of material facts necessary to prevent the assistance of the client’s illegal or fraudulent act.” The disclosure may include “disaffirming an opinion, document, affirmation, or the like, or may require further disclosure to avoid being deemed to have assisted the client’s illegal or fraudulent act. Disclosure is not required unless the lawyer is unable to withdraw or the client is using the lawyer’s work product to assist the client’s illegal or fraudulent act.”

The ABA Guidelines recognize that while there is no general obligation “to correct the erroneous assumptions of the opposing party or opposing counsel,” the duty to avoid misrepresentations and misleading conduct implies a professional responsibility to correct, and not to exploit, mistakes induced by the lawyer or the lawyer’s client.

11 Referring to Model Rule 4.1, the ABA Guidelines state that a lawyer must refrain from incorporating or affirming the statement of another that the lawyer “knows to be false.” The ABA Guidelines also state that “a lawyer should not exploit an opposing party’s material mistake of fact” and “may need to disclose information” to prevent an adversary’s reliance upon a unilateral mistake of fact. The ABA Guidelines give the example of an adversary’s reliance on an erroneous draft or settlement agreement. According to the ABA Guidelines, “it would be unprofessional, if not unethical,
knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement.”

The ABA Guidelines identify three situations where an attorney has a duty to disclose information:

(a) to withdraw a previous false statement by the attorney;

(b) to withdraw a previous false statement by the client; and

(c) to prevent the perpetration of a fraud through the representation.\textsuperscript{12}

The ABA Guidelines recognize, however, that the duty to disclose a misrepresentation is subject to the duty of confidentiality under Model Rule 1.6, which “trumps the ethical duty of disclosure under Model Rule 4.1(b).”\textsuperscript{13}

The courts have not hesitated to sanction attorneys who engage in misrepresentation by omission. In \textit{Mississippi Bar v. Mathis}, a lawyer representing a woman claiming life insurance benefits for her deceased husband had secretly arranged for the husband’s autopsy.\textsuperscript{14} He did not disclose the autopsy in discovery, and stood silent when his client testified (truthfully) that she opposed an autopsy because she could not bear to see her husband’s body torn apart. He resisted exhumation of the body for the same reason (creating the impression that no autopsy was performed). Upholding the lawyer’s suspension for ethics violations, the court held:

Mathis had personal knowledge of the autopsy and his client did not. Still, in the face of such knowledge, Mathis boldly asserted that no autopsy had been performed and that none should be performed. Surely this failure to disclose is the equivalent of an affirmative misrepresentation.\textsuperscript{15}

The Debtor in \textit{In re Malden Mills Industries Inc.},\textsuperscript{16} filed a Chapter 11 proceeding in the District of Massachusetts. After three years of slow progress, the Plan was consummated and the Debtor filed a Motion for a Final Decree. Shortly before the Motion was filed, Counsel for the Creditor’s Trust asked the Debtor’s counsel why it was pushing to close the cases quickly, given the slow progress to date. The Debtor’s agent’s counsel responded that “the year was coming up, everything was done, the case needed to be closed and that people worked better with deadlines.”\textsuperscript{17} Based on that representation,

\textsuperscript{12} \textit{Id.} at 37.

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} 620 So.2d 1213 (Miss. 1993).

\textsuperscript{15} \textit{Id.} at 1221.

\textsuperscript{16} 361 B.R. 1 (D. Mass. 2007)
the Creditor’s Trust assented to the Motion and the court entered a final decree. Fourteen hours later, the debtor filed a new Chapter 11 proceeding in Delaware. The Creditor’s Trust filed a Motion to Reopen the Massachusetts proceeding, citing misconduct of the debtor and the debtor’s agent. The court granted the motion, finding that the Debtor sought the Creditors Trust’s agreement to the decree under false pretenses. The court rejected the Debtor’s and counsel’s claim that confidentiality prevented them from disclosing the Debtor’s well-developed plan to file a second proceeding:

The Court understands that a second Chapter 11 bankruptcy filing is often necessary and appropriate. Rarely, however, does the timing and factual content demonstrate a lack of candor to a key constituency as the conduct does here. The parties’ duty of confidentiality, although perhaps sincere, did not prevent them from telling the Creditor Trust that there were other reasons for the aggressive push to close the Massachusetts Cases, even if they weren’t at liberty to specifically discuss them. The Debtor and the Agent clearly instigated the process of obtaining the Final Decree with the obvious intent of filing elsewhere.

Citing to Model Rule 4.1, among others, the Court held:

The Court finds that by seeking the Creditor Trust’s assent with knowledge of the tactical shift to Delaware on the venue transfer motion, and by offering a misleading, or at least an incomplete explanation in response to a direct question, the Debtor and Agent demonstrated a serious breach of the duty of candor, which the Court cannot condone. … Even if not outright fraud, this clearly rises to the level of “something approaching deceit” and warrants reopening the Massachusetts cases and vacating the Final Decree. ¹⁸

Some courts have questioned whether a lawyer acts improperly where he or she fails to disclose information that the adversary should have known or requested but did not. For example, in Hamilton v. Harper, ¹⁹ the plaintiff’s decedent was killed in a car accident. The other driver’s insurance carrier denied coverage and filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the alleged negligent driver. The carrier thereafter offered half of the policy limits to settle both the personal injury claim and the coverage action. The plaintiff accepted, knowing that the court had ruled in the carrier’s favor in the coverage action. The carrier was not aware of the court’s ruling. The court held that the settlement agreement was not enforceable. But the court did not sanction or criticize plaintiff’s counsel, presumably because counsel did not have an affirmative obligation to correct a misimpression that he didn’t create.

¹⁸ Id. at 8-9 (citations omitted).

In *Pendleton v. Central New Mexico Correctional Facility*, the plaintiff settled an employment discrimination case against his employer, releasing the employer for claims up to the date of the settlement agreement. After plaintiff cashed the settlement check, he filed a charge with the EEOC alleging retaliation. The release was not broad enough to preclude the EEOC charge. The court did not sanction the plaintiff’s attorney for concealing his intention to file the second charge, but wrote that “a half truth may be as misleading as a statement wholly false,” and “the failure to disclose a fact may be a misrepresentation in certain circumstances.”

In another well-known case, *Spaulding v. Zimmerman*, the minor plaintiff suffered fractured ribs and chest injuries in an accident. Defense counsel arranged for a medical exam of plaintiff, which revealed an undiagnosed aortic aneurysm possibly caused by the accident. Defense counsel did not disclose the doctor’s findings or report and reached a favorable settlement, which the court approved. When the aneurysm was later discovered, the court set aside the settlement on the ground that the defense withheld vital information. The court observed that “while no canon of ethics or legal obligation may have required them to inform plaintiff or his counsel with respect thereto, or to advise the court therein,” there was evidence of more serious injuries that were not considered by the court when it approved the settlement.

The court took a different and very strict view of omissions in *Nebraska Bar Ass’n v. Addison*. Addison was a personal injury lawyer who negotiated settlement of a hospital lien against his client for a fraction of the lien’s value. Addison knew of, but did not disclose, the existence of a substantial excess insurance policy that would cover his client’s injuries. He sat silent when the hospital’s administrator stated that there was only $150,000 in coverage for the accident. Although Addison made no affirmative misrepresentation or indeed any representation regarding the extent of coverage, the court suspended him, concluding that he had an ethical obligation to disclose the existence of the excess policy and to correct the hospital’s false impression.

The courts have often considered whether the death of a client is a material fact that an attorney must disclose in settlement negotiations. In *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, the court set aside a settlement agreement because plaintiff’s attorney failed to disclose his client’s death. The court stated:

> Here, plaintiff’s attorney did not make a false statement regarding the death of plaintiff. He was never placed in a position to do so because during the two weeks of settlement negotiations defendants’ attorney

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21 *Id.* at 641.

22 116 N.W. 2d 704 (Minn. 1962).

23 412 N.W. 2d 855 (Neb. 1987).

never thought to ask if plaintiff was still alive. Instead, in hopes of inducing settlement, plaintiff’s attorney chose not to disclose plaintiff’s death, as he was well aware that defendant believed that plaintiff would make an excellent witness on his own behalf if the case were to proceed to trial by jury.\textsuperscript{25}

The court concluded that the failure to disclose the plaintiff’s death was a material misrepresentation because the loss of his testimony “would have had a significant bearing on defendants’ willingness to settle.”\textsuperscript{26}

In a similar case, the Supreme Court of Kentucky held that an attorney’s failure to disclose her client’s death to opposing counsel “amounted to an affirmative misrepresentation” in violation of Kentucky’s ethical rules.\textsuperscript{27} The attorney negotiated a settlement in a personal injury case without disclosing her client’s death. When defense counsel learned of the death, after the settlement was consummated, he filed a grievance, claiming that he had been deliberately misled. The court agreed:

Attorneys in circumstances similar to those at bar operate under a reasonable assumption that the other attorney’s client, whether a legal fiction or in actual flesh, actually exists and, consequently, that opposing counsel has authority to act on their behalf …. Basically, when the offer was made after McNealy’s death, respondent had no authority to act on his behalf. Despite this fact, respondent proceeded to settle the case under the guise that she had the authority to do so on behalf of McNealy. Her letters to [opposing counsel] clearly imply this.\textsuperscript{28}

A Virginia ethics panel took a different view in a 1987 opinion, concluding that “[i]t is not improper … for the attorney not to disclose the death of his client to the insurance company absent a direct inquiry from the insurance company regarding the client’s health.”\textsuperscript{29} But the panel went on to say that “in order to avoid an appearance of impropriety,” the claimant’s attorney should “disclose the death of his client at the time he accepts the offer of settlement,” provided the settlement was authorized by the claimant before death and is ratified by the administrator.

A Pennsylvania ethics committee concluded that an attorney is not obligated to disclose in pre-filing settlement discussions the death of a client who is seeking damages

\begin{itemize}
\item \textsuperscript{25} Id. at 511.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Kentucky Bar Ass’n v. Geisler, 938 S.W.2d 578 (Ky. 1997).
\item \textsuperscript{28} Id. at 580.
\item \textsuperscript{29} Va Bar Ass’n Standing Comm. on Legal Ethics Op. 952 (1987)
\end{itemize}
for personal injury. The panel relied on the comments to Model Rule 4.1 indicating that a lawyer “generally has no duty to inform an opposing party of relevant facts.” It added that “neither lawyer nor client is under any obligation to come forward unbidden with information that is unknown to the other side, even if the other side will surely lose its case in the absence of knowledge of that evidence.” The panel equivocated a bit, noting that the attorney should reconsider disclosure if the case proceeds to settlement or trial.

The ABA Committee on Professional Ethics has opined that a lawyer does have a duty to disclose her client’s death before accepting a settlement offer. In Formal Opinion 95-397, the Commission stated:

When a lawyer’s client dies in the midst of settlement negotiations of a pending lawsuit in which the client was the claimant, the lawyer has a duty to inform opposing counsel and the court in the lawyer’s first communication with either after the lawyer has learned of that fact.

Like the Kentucky court in Geisler, the ABA panel focused on the attorney’s authority, concluding that a client’s death means that the attorney “at least for the moment, no longer has a client, and, if she does thereafter continue in the matter, it will be on behalf of a different client.” According to the ABA panel, failure to disclose the change in authority “is tantamount to making a false statement of material fact” within the meaning of Model Rule 4.1.

In-house lawyers should consider whether the same principles would be applied to require disclosure of changes in corporate status during the course of negotiating a deal or settlement.

IV. May a lawyer threaten criminal proceedings in a civil matter?

We all remember from law school that lawyers are prohibited from threatening criminal prosecution to gain an advantage in a civil matter. The prohibition was grounded in DR 7-105(A) of the former Code of Professional Responsibility, which stated: "A lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter."

The ABA "deliberately omitted" DR 7-105(A) from the Model Rules when they were adopted in 1981. The ABA has indicated that it did not retain the rule prohibiting criminal threats in civil matters because the drafters believed that extortionate, fraudulent or otherwise abusive threats were covered by other more general rules (e.g., Rules 3.1, 4.1, 4.4 and 8.4). The ABA, to the surprise of many, also pronounced that under

certain circumstances it is ethically appropriate to threaten criminal prosecution to gain an advantage in a civil matter:

[T]he Rules of Professional Conduct do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process.\textsuperscript{34}

The requirement that the criminal offense and the civil claim be related is based in part on the Model Penal Code's prohibition against the crime of compounding. Under the Penal Code, threats of prosecution are not criminal if "the property obtained by threat . . . was honestly claimed as restitution for the harm done" by the criminal act. In other words, a threat may be permissible if its monetary value does not exceed the amount that could be claimed as restitution.\textsuperscript{35}

The well-founded belief requirement is premised upon Model Rule 3.1, which prohibits lawyers from asserting claims that are frivolous or in bad faith. "A lawyer who threatens criminal prosecution that is not well founded in fact and in law, or threatens such prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1."

In the same year the ABA issued Opinion 92-363, the Supreme Court of West Virginia held that it is not unethical for a lawyer to seek restitution for his client rather than a criminal prosecution.\textsuperscript{36} But the negotiations for such restitution must be "otherwise legitimate." And "[s]eeking payment beyond restitution in exchange for foregoing a criminal prosecution or seeking any payments in exchange for not testifying at a criminal trial, however, are still clearly prohibited."

\textsuperscript{34} See ABA Formal Op. 92-363 at page 1.

\textsuperscript{35} Under Model Rule 8.4(b), it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The ABA Committee on Ethics explained that "[w]hile the Model Rules contain no provision expressly requiring that the criminal offense be related to the civil action, it is only in this circumstance that a lawyer can defend against charges of compounding a crime (or similar crimes.)" Additionally, under Rule 8.4(d) and (e) it is professional misconduct for a lawyer to "engage in conduct . . . prejudicial to the administration of justice" or to "state or imply an ability to influence improperly a government agency or official."

Similarly, in *State of Oklahoma ex rel. Oklahoma State Bar Association v. Worsham*, the court held:

Even though Rules 3.1, 4.1, 4.4, and 8.4 do not specifically address a lawyer's threatening criminal prosecution, these rules limit certain threats. A threat of criminal prosecution without a basis in fact or law is a violation of Rule 3.1 which prohibits the assertion of frivolous claims. Rule 4.1, duty regarding truthfulness, prohibits a lawyer from threatening criminal prosecution unless the lawyer intends to proceed with the criminal charges. Rule 4.4 prohibits a lawyer from making a threat which has "no substantial purpose other than to embarrass, delay, or burden a third person. . . ." A threat that the lawyer could influence a governmental official would violate Rule 8.4(d) and (e).

**Conclusion**

Lawyers are generally expected to tell the truth and to act in good faith in negotiating with non-clients. The line between permissible “puffing” and impermissible misrepresentation may be a fine one, and lawyers must be careful not to lie about facts material to the transaction. Lawyers must be equally careful about what they don’t say. Although trained to be wordsmiths, lawyers must not employ their mastery of language to affirmatively mislead third parties about material facts. And threats should be carefully considered and used sparingly.

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37 957 P.2d 549 (Okla. 1998).